SUPREME COURT, U. S.

FILED

DEC 7 1967

JOHN F. DAVIS, CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 363

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

vs.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELE-CASTERS, INC., AND JACK O. GROSS, PETITIONERS,

vs.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JULY 13, 1967 (No. 363) AND JULY 27, 1967 (No. 428)
CERTIORARI GRANTED OCTOBER 23, 1967

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

vs.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELE-CASTERS, INC., AND JACK O. GROSS, PETITIONERS,

vs.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
FCC Docket No. 15971 (CATV Rules):	
Second Report and Order, March 4, 1966, 2 F.C.C.2d 725	1
Memorandum Opinion and Order, May 25, 1966, 3 F.C.C. 2d 816	97

Washington, D. C. · THIEL PRESS · 202 · 393-0625

Page

Memorandum Opinion and Order, Jan. 5, 1967, 6 F.C.C. 2d 389 111

FCC Docket No. 16786 (In re Midwest Television, Inc.):

Memorandum Opinion and Order, July 20, 1966, 4 F.C.C. 2d 612 146

Erratum to Memorandum Opinion and Order, July 26, 1966 176

United States Court of Appeals for the Ninth Circuit:

Interlocutory Injunction 180

Opinion, Barnes, J. 184

Concurring Opinion, Ely, J. 193

Decree 194

FCC 66-220

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	
AMENDMENT OF SUBPART L, PART 91, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE BUSINESS RADIO SERVICE FOR MICROWAVE STATIONS TO RELAY TELEVISION SIGNALS TO COMMUNITY ANTENNA SYSTEMS.	Docket No. 14895
AMENDMENT OF SUBPART I, PART 21, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE FOR MICROWAVE STATIONS USED TO RELAY TELEVISION BROADCAST SIGNALS TO COMMUNITY ANTENNA TELEVISION SYSTEMS.	Docket No. 15233
AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS.	Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766)

SECOND REPORT AND ORDER

(Adopted March 4, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX DISSENTING IN PART AND CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT AND ISSUING A STATEMENT.

1. On April 23, 1965, the Commission issued a notice of inquiry and notice of proposed rulemaking in docket No. 15971 (30 F.R. 6078), which divided the proceeding into two parts. In part I the Commission reached an initial conclusion that it has jurisdiction over all community antenna television (CATV) systems, whether or not microwave facilities are used, and proposed to extend to nonmicrowave CATV systems the substantive provisions of the carriage and nonduplication rules adopted for microwave-served CATVs in dockets Nos. 14895 and 15233. *First Report and Order* in dockets Nos. 14895 and 15233, 30 F.C.C. 683; *Memorandum Opinion and Order* in dockets Nos. 14895 and 15233, 1 F.C.C. 2d 524. Part I also invited comment on various auxiliary questions affecting all CATVs which were not resolved in dockets Nos. 14895 and 15233. These have to do with color duplication, educational television stations, station-owned translators, and a possible transition period before the carriage pro-

visions are made fully applicable to existing CATV systems with limited channel capacity (notice, pars. 33–36).

2. In part II of the proceeding the Commission initiated an inquiry looking toward possible rulemaking on broader questions posed by the trend of CATV development, including (1) the effect of CATV entry into major cities on UHF independent stations, (2) the possible need for limitations on the distance a station's signal may be extended by CATV, (3) "leapfrogging,"[1] (4) program origination or alteration by CATV and the related question of pay-TV or combined CATV-pay-TV operations, and (5) various miscellaneous questions. In paragraph 49 of part II the Commission adopted an interim policy, pending the outcome of the proceeding, which provides that a microwave application to serve a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing was required for microwave facilities to serve a CATV system in an "overshadowed" community where, because of its proximity to three or more existing stations, any new UHF station would be independent in operation. In paragraph 50 of part II, the Commission proposed an interim rule along similar lines to govern nonmicrowave CATV entry into such areas.

3. Comment on part I and paragraph 50 of part II was due at an earlier date than that specified for the remaining portions of part II,[2] which, it was anticipated, would require more lengthy consideration and possibly a further notice to afford an opportunity for comment on any specific rule proposals of the Commission (notice, pars. 64, 68). Comments and reply comments on part I and paragraph 50 have now been fully considered by the Commission. This report and order deals only with these aspects of the proceeding.

PART I. THE CARRIAGE AND NONDUPLICATION PROVISIONS

4. In proposing that the substantive provisions of the carriage and nonduplication rules governing microwave CATV systems be extended to all CATV systems, the notice emphasized (pars. 27, 30) that two main issues were presented: (1) Whether the Commission can appropriately proceed on the basis of its present statutory authority, and (2) whether any special problems of substance or procedure are posed by rules going to nonmicrowave systems. We turn now to a discussion of the first issue.

5. The threshold jurisdictional question is twofold: (*a*) Whether the Commission has jurisdiction as a matter of law over nonmicrowave

[1] "Leapfrogging" means the distribution by the CATV system of more distant signals in preference to signals of stations located much closer to the system.

[2] Comments and reply comments on pt. I and par. 50 were originally due on June 25 and July 26, 1965, respectively. By orders issued on June 16 and June 30, 1965, these times for filing were extended to July 26 and Sept. 17, 1965. Formal comments and/or reply comments have been received from the parties listed in the attached app. A. In addition, a large number of informal comments or letters from members of the public have been received and placed in the docket.

CATV systems under the present provisions of the Communications Act, and (*b*) whether it would be appropriate to exercise any such jurisdiction without a legislative enactment on the subject. In the notice we concluded initially, for the reasons set forth in our memorandum on jurisdiction attached to the notice, that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It further appeared to us that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave. However, we pointed up the following matters (par. 31 of the notice):

> While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (*i*) a congressional guidance as to policy and (*ii*) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from promulgating rules along the lines of those adopted in dockets Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rulemaking proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

6. Following the issuance of the notice, H.R. 7715 was introduced in the House on April 28, 1965, and hearings on the bill were held before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce in May and June 1965. In the Commission's testimony concerning the bill, it was stated that the Commission did "not contemplate applying any new rules that we may enact with respect to the rest of the CATV industry until 1966; in other words, until at least after this session of Congress is over and it has had the ability to consider this problem." (Hearings before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on H.R. 7715, 89th Cong., 1st sess., p. 25.) No bill relating to CATV has been introduced in the Senate, and the 89th Congress adjourned its first session without enacting any legislation on CATV.

7. We think it appropriate, therefore, to take up without further delay part I and paragraph 50 of the rulemaking proceeding. Here we note that CATV is developing and expanding at a very rapid rate (see pars. 31–39, within). We cannot ignore the increasing risk of adverse impact on the "public interest in the larger and more effective use of radio" (sec. 303(g)) which accompanies the burgeoning CATV development. See paragraphs 116–117; part II, within. Further, it is contrary to sound regulation for carriage and nonduplication to be applicable to the microwave CATV system and inapplicable to the nonmicrowave, which constitutes the other three-fourths of the industry. And, if the carriage and nonduplication provisions are to be applied to nonmicrowave systems, it would obviously minimize the disruption to the viewing public to do so as soon as possible—before a large number of incipient CATV systems commence operation and their subscribers become accustomed to service not in compliance with the rules. It would also appear to entail less hardship to the new CATV operator to commence operation under the rules than to undergo a subsequent conversion. Moreover, removal of the present uncertainty would assist local franchising authorities, as well as franchise applicants. We have received several inquiries from local authorities as to when a decision might be expected, with an indication in some instances that action on franchise applications was being withheld pending our decision. The "introduction of as much stability as possible into the planning perspective of those affected by our regulation" is regarded by us as a "highly desirable objective" (first report and order in dockets Nos. 14895 and 15233, par. 78). For all these considerations, developed more fully within, we think it our responsibility under the Communications Act to resolve the issues in part I and paragraph 50.

A. Jurisdiction as a Matter of Law

8. While the comments filed in support of present jurisdiction outnumber those opposed,[3] there appears to be no need to review the substance of the supporting comments here. The bulk of the supporting comments either restate essentially the same matters set forth in the Commission's memorandum on its jurisdiction and authority

[3] *Supporting comments* were filed by: National Association of Broadcasters; Association of Maximum Service Telecasters, Inc.; Storer Broadcasting Co.; American Broadcasting Co.; Westinghouse Broadcasting Co., Inc.; Fuqua Industries, Inc.; WTVY, Inc.; Snyder & Associates; Western Slope Broadcasting Co.; Black Canon Broadcasting Co.; Mesa Verde Broadcasting Co.; Houston Post Co.; WKBH Television, Inc.; Bonneville International Corp.; Mobile Video Tapes, Inc.; D. H. Overmyer; Aroostook Broadcasting Corp.; Taft Broadcasting Co.; WJAC, Inc.; Springfield Television Broadcasting Corp.; Midwest Television, Inc.; West Central Broadcasting Co.; Rust Craft Broadcasting Co.; WGAL Television, Inc.; American Farm Bureau Federation; National Farmers Union; National Grange; Tri-State TV Translators Association; labor organizations affiliated with the AFL–CIO; Eastern Educational Network; and commenting jointly, television stations KHOU–TV; KOTV, KXTX, WANE–TV, WAVE–TV, WFIE–TV, WFRV, WISH–TV, WJXT, WMT–TV, WNOK–TV, WTOP–TV. *Opposition*—Commenting in opposition to jurisdiction were: National Community Television Association, Inc.; Smith & Pepper (on behalf of 150 CATV systems); Columbia Broadcasting System; National Broadcasting Co.; TV Cable Service of Abilene, Inc.; Entron, Inc.; American Cable Television, Inc.; Meredith Broadcasting Co.; Triangle Publications, Inc.; Jerrold Electronics Corp.; International Teleprompter Corp.; Montgomery Television Association, Inc.; and Journal Co. *Other*—American Telephone & Telegraph Co. and U.S. Independent Telephone Association took no position on the jurisdictional question but requested that the carriage and nonduplication provisions be applied to CATV systems directly rather than to microwave common carriers.

(notice, attachment B) or express agreement with that memorandum.[4] Since we believe that the case for jurisdiction is sufficiently set forth in our memorandum, a copy of which is attached to this document for convenient reference (attachment C), we shall discuss only the arguments made in the opposition comments.

9. The comments urging a want of jurisdiction make three principal arguments. It is asserted, first, that the Communications Act contains no provision granting the Commission authority over CATV systems. Second, it is contended that there are specific provisions in the act which show a lack of authority. And, third, it is urged that the Commission itself has repeatedly denied jurisdiction over CATV systems, that Congress is aware of and has acquiesced in this administrative interpretation, and that principles of statutory construction foreclose the Commission from now claiming jurisdiction. We shall discuss these arguments in order.

10. The contention that the Communications Act contains no provision granting the Commission authority over CATV systems takes issue with the sufficiency of the statutory base set forth in the Commission's memorandum (pp. 2–7). We there relied on the fact that section 2(a) states that the "provisions of this act shall apply to all interstate and foreign communication by wire or radio * * * and to all persons engaged within the United States in such communication," and concluded that CATV systems are engaged in "communication by wire," within the meaning of section 3(a), which is interstate in nature. With respect to the provisions of the act to be applied, we stated that the authority conferred by section 303(h) to issue rules establishing the area or zone to be served by any station includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act), and specifically a person subject to the provisions of the act, and encompasses authority to specify by rule the conditions under which the station's signal may be extended beyond the prescribed service area or zone by CATV. Moreover, apart from section 303(h), the general rulemaking authority of the Commission (secs. 4(i) and 303 (f) and (r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

11. It is asserted that these sections do not suffice to support jurisdiction because it is necessary to find some specific provision of the act expressly conferring jurisdiction over the subject matter of CATV. The authorities cited in our memorandum (pp. 4–6) to the effect that our authority does not depend on a specific reference to CATV or CATV practices in the act[5] are distinguished on the ground that they

[4] While Storer Broadcasting Co. does not agree with the impact argument (Commission's memorandum, pp. 4–5) as a jurisdictional base, it takes the position that the Commission now has limited jurisdiction over all CATV systems which is sufficient to support the measures proposed in pt. I and par. 50.

[5] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218–219; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203; *American Trucking Association* v. *United States*, 344 U.S. 298, 309–311; *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *Houston, East and West Texas Railway Co.* v. *United States*, 234 U.S. 342; *Public Service Commission of State of New York* v. *Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).

concern authority over unspecified practices of regulated licensees rather than the power to regulate unspecified persons or businesses not licensed under the act. Unless specific authority is required for regulation of nonlicensees, it is argued, the Commission could utilize its general rulemaking authority to regulate any business (such as amusements, program producers, etc.) which has an impact on broadcasting or uses communications facilities.

12. The attempted distinction, even assuming arguendo its validity, does not fit the situation here. We are not presented with the question of whether the Commission's broad powers to take action necessary to carry out the provisions of the act include authority to regulate a business not subject to the act merely because of some impact on, or use of, interstate communications under the act.[6] CATV systems differ from most other businesses in that they are themselves engaged in "interstate communication by wire," a business to which the act's provisions are expressly applicable (secs. 2(a), 3(a)).[7] Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b). We are not powerless to prevent frustration of our action under those sections by persons subject to the act merely because the licensing provisions of the statute are inapplicable to them. Sections 312 (b) and (c) provide for the issuance of a cease and desist order against "any person"—not merely any "licensee or permittee"—who has "violated or failed to observe any rule or regulation of the Commission authorized in this act * * *."

13. It is further asserted that *Federal Power Commission* v. *Panhandle Eastern Pipeline Company*, 337 U.S. 498, precludes a conclusion that the general rulemaking power of the Commission encompasses authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) and 303(h) by CATV. However, the *Panhandle* case is readily distinguishable. That case was decided upon the basis of a specific provision in the Natural Gas Act which denied the Federal Power Commission jurisdiction to deal with the problem there involved.[8] Section 1(b) of the Natural Gas Act provides that the "provisions of this Act shall apply * * * to the sale in interstate commerce of natural gas for resale * * * but shall not apply * * * to the production or gathering

[6] We have not claimed plenary power to regulate any business which may have some impact on broadcasting or other interstate communication by wire or radio. In the jurisdictional memorandum we stated that the "Commission clearly has no jurisdiction over bowling alleys or theaters, for example * * *." Moreover, we sought and obtained specific statutory authority to regulate the manufacture of television receivers shipped in interstate commerce for sale to the public (Public Law 87-529, 47 U.S.C. 303(s)). There may be instances, of course, where the Commission's regulatory power appropriately extends to some activities of persons not engaged in communication by wire or radio. But there is no necessity to determine the limits or basis for such authority here.

[7] Since CATV systems fall within the definition of communication by wire and their operations are interstate in nature, it makes no difference that they are not expressly mentioned by name. The act applies to "*all* interstate communication by wire or radio" and to "*all* persons engaged in such communication" [sec. 2(a), emphasis added]. For that matter, prior to the 1962 amendment incorporating sec. 303(s), the word "television" did not appear in the act. Yet, it has long been established that the act applies to television because it falls within the definitions of "radio communication" and "transmission of energy by radio" contained in sec. 3. *Allen B. Dumont Labs, Inc.*, v. *Carroll*, 184 F. 2d 153, 155 (C.A. 3), *cert. den.* 340 U.S. 929.

[8] Other Federal Power Commission cases cited in the comments, *Amerada Petroleum Corp.* v. *Federal Power Commission*, 334 F. 2d 404 (C.A. 8), and *Pan American Petroleum Corp.* v. *Federal Power Commission*, 339 F. 2d 694, are similarly inapposite since they involved a lack of jurisdiction predicated upon a statutory exclusion.

of natural gas" (52 Stat. 821, 15 U.S.C. sec. 717(b)). The court held that the transfer of gas leases fell within the exclusion as to the "production or gathering of natural gas" and hence lay outside the scope of the Power Commission's regulatory powers. In declining to find authority in the Power Commission's general rulemaking powers, the court stated that the "power to do the things appropriate to carry out the provisions of the act can hardly be taken to rescind a prohibition against certain actions" (337 U.S. at 508). By contrast, there is no provision in the Communications Act which specifically excludes CATV systems from the Commission's jurisdiction. On the contrary, section 2(a) states that the "provisions of this Act shall apply to *all* interstate communication by wire or radio * * * and to *all* persons engaged within the United States in such communication * * *. [Emphasis added.]" Moreover, *Panhandle* has been construed narrowly in a recent case arising under the Natural Gas Act, which sustained the Power Commission's jurisdiction over gas leases for resale in interstate commerce. *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 403–404.

14. The argument that the Communications Act contains language expressly excluding jurisdiction over CATV systems is predicated primarily on the provisions of section 2(b) and section 214(a) of the act. Section 2(b) states that nothing in the act shall be construed to give the Commission jurisdiction with respect to "intrastate communication service by wire or radio of any carrier" or "any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities located in an adjoining State * * * of another carrier * * *." Section 214(a) provides, in pertinent part, that "no carrier" shall construct or operate a line without a prior certificate from the Commission, provided, however, that no certificate is required for construction or operation of "a line within a single State unless such line constitutes part of an interstate line." It further states: "As used in this section the term 'line' means any channel of communication established by the interconnection of two or more existing channels."

15. We are not persuaded that these sections demonstrate a statutory denial of jurisdiction over CATV systems. In the first place, both sections by their terms apply to "carriers" and we have repeatedly ruled that CATV systems are not "carriers" within the meaning of section 3(h) of the act. *Frontier Broadcasting Co.*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 403, 427–428; *WSTV, Inc.* v. *Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184; *Philadelphia Television Broadcasting Co., et al.*, FCC 65–702 (Aug. 2, 1965). Nor are television stations "carriers" under section 3(h). Moreover, even if CATV systems were to be deemed carriers, their operations are interstate in nature since they are carrying interstate television signals. A common carrier carrying television signals does not fall within the exemption in section 2(b)(1) because its physical facilities are located in only one State; it "performs an interstate communications service." *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F. 2d 729 (C.A.D.C.); *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific*

Telatronics, Inc., 4 Pike & Fischer, R.R. 145; and cf. *California Interstate Telephone Co.* v. *Federal Communications Commission*, 328 F. 2d 816 (C.A.D.C.).[9] See also, *United States* v. *American Telephone and Telegraph Co.*, 57 F. Supp. 451, 454 (S.D.N.Y.), aff'd *per curiam*, *sub nom. Hotel Astor* v. *United States*, 325 U.S. 837. By the same token a CATV system, if it were a carrier, would constitute "part of an interstate line" for purposes of section 214(a), even though its facilities were located within a single State.

16. The most vigorously pressed argument against jurisdiction is the assertion that the Commission is estopped by past disclaimers of jurisdiction over CATV systems and congressional acquiescence in those disclaimers (see par. 28 of the notice herein). Reliance is placed on the principle of statutory construction that a consistent, longstanding administrative interpretation is entitled to great weight, particularly where Congress is aware of the administrative determination and has subsequently amended the statute without changing the applicable section.[10] Whatever the force of this principle in other circumstances, we do not think that it is dispositive of the legal question of our jurisdiction here.

17. Initially, it bears noting that some of the precedents cited as establishing a consistent contrary position primarily concerned matters upon which we do not rely as a basis for jurisdiction. We have consistently held that CATV systems are not common carriers within the meaning of section 3(h), and hence do not come within the provisions of title II applicable to carriers. *Frontier Broadcasting Company*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 403, 427–428; *WSTV, Inc.* v. *Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184. But we have not proposed to depart from this ruling, which has been reaffirmed since the issuance of the notice herein. *Philadelphia Television Broadcasters Co., et al.* v. *Rollins Broadcasting, Inc.*, docket No. 15926 (FCC 65–702, Aug. 2, 1965) now pending on appeal (case No. 19577, C.A.D.C.).[9] Nor have we departed from our earlier rulings that CATVs are not engaged in "broadcasting" within the meaning of section 3(o) and are not encompassed within section 325(a). *CATV and TV Repeater Services*, 26 F.C.C. 403, 428–430. In areas closer to the claimed basis for jurisdiction, the precedents do not reflect a consistent contrary position.[11] Thus, while we initially

[9] That the carrier in *Idaho Microwave* was carrying the signal of a television station located in another State is not of controlling significance. All television broadcasting is interstate in nature. *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Capital City Telephone Co.*, 3 F.C.C. 189, 193–194; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279. Moreover, in the case of network programing the communication link between the network and the station transmitter forms an additional part of the interstate chain of communication. *Ward*, *supra*, 300 F. 2d at 819.

[10] Cases cited to us in this connection include: *Hanover Bank, Ex.* v. *C.I.R.*, 369 U.S. 672, 686–687; *United States* v. *Leslie Salt Co.*, 350 U.S. 382, 396–397; *Norwegian Nitrogeon Co.* v. *United States*, 288 U.S. 294, 315; *Luckenback Steamship Co.* v. *United States*, 280 U.S. 173, 183; *Cammarano* v. *United States*, 358 U.S. 498.

[11] The position of Congress, if it has acquiesced in the Commission's rulings, is not clear. It is true, as set forth in the notice, par. 28, that following our decision in *CATV and TV Repeater Services*, 26 F.C.C. 403, the 86th Congress gave extensive consideration to some of the various legislative proposals on CATV submitted by the Commission and others, but enacted no legislation. Moreover, bills introduced in subsequent Congresses received no action. However, Congress also took no action after being apprised of the partial reversal of that decision in *Carter Mountain*. 29th FCC Annual Report, 1963. Congress likewise is aware of our initial conclusion as to jurisdiction in the notice herein issued on Apr. 23, 1965. Although a subcommittee of the House Commerce Committee subsequently held hearings on H.R. 7715, no committee report issued in the first session of the 89th Congress, and no legislation on CATV was considered or introduced in the Senate.

disclaimed jurisdiction to deny a common carrier microwave authorization to relay television signals to CATV systems (*Intermountain Microwave*, 24 F.C.C. 54; *CATV and TV Repeater Services*, 26 F.C.C. 403, 431–433), this ruling was later reversed in our *Carter Mountain* decision, 32 F.C.C. 459, which was sustained on judicial review. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), *cert. den.* 375 U.S. 951. In *CATV and TV Repeater Services*, we disclaimed plenary power, under section 303 (a), (b), (f), (g), (i), and (r), to "regulate any and all enterprises which happen to be connected with one of the many aspects of communications" (28 F.C.C. at 429)—a power which is not claimed here. However, we assumed (without deciding) that CATVs are within the scope of section 3(a) (26 F.C.C. at 428), and also found it unnecessary to pass on the question of our authority to regulate them directly because of adverse effect on broadcasting (26 F.C.C. at 431). And, finally, we have not previously ruled on the question of whether section 303(h) encompasses authority to regulate CATV.

18. More important, even if our past rulings in this troublesome area had been consistent, we are not estopped from correcting a ruling of law which appears to be clearly erroneous. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), *cert. den.* 375 U.S. 951; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672; *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404–406.[12] As the Supreme Court commented in the *Phillips Petroleum* case, in sustaining the Federal Power Commission's jurisdiction over the sale of gas by gas producers for resale in interstate commerce despite that agency's consistent past disclaimer of jurisdiction, "even consistent error is still error" (347 U.S. 672, 678, footnote 5). Moreover, in *United Gas Improvement* the authority of the Power Commission over gas leases for resale in interstate commerce was upheld, notwithstanding the fact that the agency had initially concluded in the same proceeding that it lacked jurisdiction and then reversed itself on remand (on another ground) from a court of appeals decision which assumed a lack of authority on the basis of *Panhandle* (381 U.S. at 404–406). *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143, 145 (C.A.D.C.).

19. As indicated in the notice, (par. 28), our "jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion." However, the arguments discussed above do not persuade us that jurisdiction is lacking, and no other bar to jurisdiction has been brought to our attention. After careful consideration of all the comments we are convinced that the case for present jurisdiction is a strong one. Accordingly, for the reasons set forth above and in our memorandum as to jurisdiction (app. C), we conclude that CATV systems are engaged in interstate communication by wire to which the

[12] See also, *Calbeck* v. *Travellers Ins. Co.*, 370 U.S. 114, 127, footnote 15; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183; *Association of Clerical Employees* v. *Brotherhood of R. & S.S. Clerks*, 85 F. 2d 152, 156 (C.A. 7).

provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). We further conclude that our statutory powers, particularly under section 4(i), 303 (f), (g), (h), and (r) include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1, 307(b), and 303(s) of the act and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used. The rules proposed in part I and paragraph 50 of the notice are within our legal authority.

B. Assertion of Jurisdiction

20. We turn now to the further question of whether jurisdiction over nonmicrowave CATV should be exercised at this time. Most of the comments in support of jurisdiction favored an immediate extension of the carriage and nonduplication requirements to nonmicrowave CATV systems, and the adoption of an interim policy either along the lines proposed in paragraph 50 of the notice or of broader scope. However, some of the supporting comments and many of the opposition comments took the position that we should not exercise jurisdiction, even if present, until Congress has legislated on the subject. It is urged that this would provide needed policy guidelines and avoid protracted litigation on the jurisdictional issue.

21. We stated in the notice (par. 31) that we would "welcome (*i*) a congressional guidance as to policy, and (*ii*) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest." In this report, we stress again the desirability in our view of congressional guidance in this important area. But thus far the congressional guidance or clarification has not been forthcoming; and in the present circumstances, our decision cannot properly turn on a desire to avoid litigation or on the hope of obtaining policy guidance in the CATV field. The Commission has not been "left at large" as to the criterion to be following in performing our statutory duties in the dynamic communications field. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219–220. The public interest touchstone provided by Congress afforded a sufficient standard for our decision to adopt the carriage and nonduplication requirements for microwave-served CATV systems in the first report and order in dockets Nos. 14895 and 15233. Since the "considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service apply equally" to nonmicrowave CATV systems (notice, par. 27), there is likewise a sufficient standard for judgment here. Finally, our action with respect to the paragraph 50 proposal is similarly dictated by the "public interest in the larger and more effective use of radio" (sec. 303(g)).

22. Most of the comments agree that, apart from the basis for jurisdiction, there is no significant difference between microwave and nonmicrowave systems. However, National Community Television Association, Inc. (NCTA), asserts that there is no basis for assuming

they are alike. It points to no factual distinction. Rather, NCTA renews its contentions in dockets Nos. 14895 and 15233 that no adequate factfinding inquiry has been conducted, and claims further that adverse impact has not been established and cannot support an assertion of jurisdiction. In this connection, NCTA has appended to its comments the material it submitted before the House subcommittee in hearings on H.R. 7715. It urges particularly that the 15 days before and after nonduplication period is unjustified, and has no reasonable relationship to the showing of nonnetwork programing. NCTA's staff has undertaken a study to test the validity of the Commission's sample week network study (first report, pars. 104–109), and has found that the data developed by the Commission supports its conclusion that delayed programing occurs most frequently among affiliates in the mountain time zone, and there in one- and two-station markets. NCTA claims that its study of 33 mountain time zone stations with CATV penetration shows no adverse consequences (NCTA comments, exhibit A). It points in addition to specific examples of small market stations which have allegedly increased circulation and maintained the same or a higher network hourly rate since 1960, despite substantial CATV penetration of their service areas (NCTA comments, exhibits A and B).

23. While the inferences NCTA draws from its studies are sharply criticized in the reply comments of Association of Maximum Service Telecasters (AMST), we do not think it necessary or useful to set forth the contentions of each or to discuss their dispute as to individual situations. The NCTA appendixes do not differentiate between microwave and nonmicrowave CATV systems; on their face they constitute an attack on the validity of the first report and order in dockets Nos. 14895 and 15233. But the supplementary material upon which NCTA now relies as indicating a lack of past impact is similar in nature to the showing there considered at length and would not in itself warrant reversal of our conclusions.[13] Indeed, NCTA, in relying upon its showing, simply ignores the two most important grounds of our decision, namely, (*i*) the fair competition ground, and (*ii*) the economic impact ground, *based on the CATV trend in recent years.* Since this is so, it may be well to restate those grounds briefly, and to take account of current information pertinent to those grounds.

24. In the first report and order in dockets Nos. 14895 and 15233, we concluded that CATV serves the public interest when it provides program choices not locally available off the air and acts as a supplement rather than a substitute for off-the-air television service, explaining our principal reasons as follows (par. 44):

> * * * Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to *all* people of the United States on a fair, efficient, and

[13] We have decided, for the reasons set forth in pars. 47–55 below, to delete the provision for nonduplication 15 days before and after the local broadcast and to substitute a requirement for nonduplication only on the same day as the local broadcast. Thus, our resolution of this matter affords NCTA substantially the relief it has requested.

equitable basis (secs. 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

25. Our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) That failure to carry local stations and duplication of their programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV (pars. 49–57, 76), and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential (pars. 58–75, 77).

26. With respect to the first ground, we found that the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers (par. 51). We stated (par. 57):

> As a competitive practice, the failure or refusal by a CATV system to carry the signal of a local station is plainly inconsistent with our belief that CATV service should supplement, but not replace, off-the-air television service. The cable system that follows such a practice offers the subscriber the benefits of additional television service at the price of blocking or impeding his access to available off-the-air signals. * * *
>
> Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible would we consider countenancing such a practice.

27. We further pointed out that CATV, though distributing the programs of the television broadcast service, stands outside its normal program distribution process and fails to recognize the reasonable exclusivity for which the local stations have bargained in the program market when it duplicates local programing via the signals of distant stations (pars. 52–56). We summarized our conclusion that this was unfair and inconsistent with CATV's supplementary role as follows (par. 57):

> In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programing via the signals of distant stations as a fair method of competition. We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. We think it apparent, however, that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs. We think the basic congressional judgment underlying section 325(a) limitation on rebroadcasting is the same.
>
> Nor do we consider the duplication of existing off-the-air service to be consistent with CATV's appropriate role as a supplementary service. Whatever the ultimate impact of CATV competition upon the revenues and operation of competing stations, duplication is highly likely to affect the audience

for the specific programs involved. And it does so without generally offering the public a substantially different service. We believe that a service such as CATV, which lives on the product of the existing television service, should at a minimum give some measure of recognition to the fundamental distribution practices which have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries. Once again, unless we were convinced that the impact of CATV competition upon broadcasting service would be negligible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete. [Footnotes omitted.]

28. We stated that the foregoing grounds were "enough to justify regulatory action" (par. 58) and that "every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station" (par. 76). But, as stated, we also turned to another ground based on the economic impact of CATV upon television broadcast development. We considered at some length the data and arguments before us on the question of impact (pars. 58–75), finding—as in 1959—that it is "impossible, with the data at hand, to isolate reliably the effects of CATV competition from all of the other factors which operate to produce particular financial results in differing settings" (par. 68). However, taking account of nationwide trends affecting the nature of CATV offerings, the character of the markets entered, and the degree of penetration achieved, we also found it plain that CATV could have a substantial negative effect upon station revenues and audiences even though we lack the tools to measure precisely the degree of impact (pars. 65–69). We further found reason to believe that the impact was likely to be "more serious in the future than it has been in the past" (par. 69), and stressed our concern with the effect of explosive CATV growth in a critical period for UHF development (pars. 71–72). In sum, the Commission's judgment on this ground was based very largely, not upon the past, but upon the trends which were already evident and whose dimensions called for action now to assure the public interest in the future.

29. The additional showing made in the appendixes to the NCTA comments is not directed to the above crucial considerations concerning the trends in the CATV or UHF fields. Instead, it focuses upon certain situations which, it claims, establish that CATV has no adverse impact upon television broadcasting. But each of its examples is sharply disputed by AMST, which points to significant impact in some cases or sets forth other factors for the improvement in the situation of the television station in the face of CATV competition. For example, AMST notes that several stations whose network hourly rate has not declined since 1960 were already at or near the minimum rate for the network involved (AMST reply comments, pp. 27–28, attachment A, pp. 10–14). It attributes whatever success station WLUC–TV, Marquette, Mich., has enjoyed in recent years to new management beginning in 1960 and states that the station has suffered a decline in average quarterly hour audience while local revenues have

remained stagnant (AMST reply comments, pp. 29–30, attachment A, p. 14). AMST also points out that WBOC–TV, Salisbury, Md., following a change in ownership in 1961 and the infusion of a substantial financial investment, extended its hours of operation, improved its programing, and doubled its service area through a substantial power increase. (AMST reply comments, pp. 31–32, attachment A, pp. 15–16.)

30. It would, we think, serve no useful purpose to delve into each of those situations. For even assuming that it were possible to isolate the significance of CATV in each situation from other factors (as it was feasible in the *Carter Mountain* case, first report, par. 64), it would not afford greater insight into the crucial aspect of the matter—the explosive growth and changing character of CATV and its possible impact upon television broadcasting in the future. And, as to that aspect, events since the issuance of the first report reinforce the judgment made by us upon the basis of the above-mentioned trends in the industry. For, as the comments in this proceeding show, without dispute in this respect, the trends described in paragraph 65 of the first report have become even more pronounced. We shall briefly review those trends in light of their importance to our judgment.

31. In the first report we relied on estimates in the Seiden report which were based on data compiled in 1964.[14] The Seiden report stated (p. 2) that there were approximately 1,300 CATV systems serving approximately 1.2 million TV homes. The reply comments of AMST, filed on September 17, 1965, contain the following estimates as of mid-1965 (AMST reply comments, attachment A, prepared by Economic Associates, Inc., of Washington, D.C., using data from Television Factbook (No. 35) and Television Digest):

Communities with operating CATVs	1,847
Communities with CATVs franchised (but not yet operating)	758
Communities with CATV applications pending	938

While these figures are not tendered as precisely accurate,[15] the rapidly accelerating rate of growth is confirmed in statistics given by licensees commenting on the situation within their service areas,[16] in the trade press, and in letters received by the Commission from local franchising authorities and other members of the public.

32. In addition, the channel capacity of CATV systems is increasing. According to the Seiden report (pp. 2, 54) the usual CATV system in 1964 delivered five signals and 85 percent of all systems delivered between three and seven signals. However, there is indication in the record that most of the new CATV systems have a channel capacity of 12 channels and many of the older systems are expanding their original capacity. The AMST reply comments (attachment A) contain the following table showing the cable capacity for the 753 CATV systems for which it was able to obtain data:[17]

[14] This estimate was based on comments filed in dockets Nos. 14895 and 15233 and the report submitted to us by Dr. Martin H. Seiden, entitled "An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry" (Government Printing Office, February 1965), hereafter referred to as the "Seiden report."

[15] There are other estimates (see par. 116, describing the Television Digest estimate), but whatever the estimate, CATV growth is clearly explosive in nature.

[16] E.g., comments of Midwest Television, Inc.; West Central Broadcasting Co.; WKBH Television, Inc.; Mobile Video Tapes, Inc.; and Bonneville International Corp.

[17] The data were compiled from reports in Television Factbook (No. 35), Television Digest, questionnaires on file at the Commission, and ARB publications.

CATVs starting	Capacity, in number of channels (including FM) [1]										
	2	3	4	5	6	7	8	9	10	11	12
Thru 1951	.....	3	.....	28	2	1	.....	.....	.....	.....	13
1952	.....	3	.....	26	.....	1	1	.....	.....	.....	15
1953	.....	3	1	36	1	4	.....	2	1	.....	10
1954	1	5	.....	39	3	3	.....	2	1	.....	20
1955	.....	5	.....	43	2	2	.....	4	.....	.....	11
1956	.....	3	1	30	.....	.....	.....	1	.....	.....	10
1957	1	.....	.....	23	.....	3	1	.....	1	.....	5
1958	.....	2	.....	27	1	.....	1	.....	1	.....	7
1959	.....	.....	1	28	.....	.....	1	1	.....	.....	4
1960	.....	2	.....	26	.....	2	1	1	.....	.....	6
1961	.....	.....	.....	21	.....	1	.....	.....	1	.....	9
1962	1	.....	.....	25	.....	.....	.....	1	.....	.....	16
1963	.....	.....	.....	21	1	1	1	.....	.....	.....	33
1964	.....	.....	.....	15	1	2	2	9	.....	3	53
Thru July 1965	.....	.....	.....	5	.....	1	2	1	.....	.....	44
Totals	3	26	3	393	11	21	10	22	5	3	256

[1] Includes expansions subsequent to starting date. Limitations of the source data make it impossible to determine the original capacity of most of these systems.

The expanding channel capacity is also reflected in the answers submitted to our questionnaire sent to all known CATV systems in connection with the transition period question. (See pars. 103–107, within.)

33. It further appears that CATV activity is accelerating in areas where there is the greatest interest in UHF development. The comments of AMST list all communities or metropolitan areas where UHF stations were operating, authorized, or applied for as of July 8, 1965, and indicate the extent of colocated CATV activity (AMST comments, attachment C, table 2).[18] The results are summarized by AMST as follows (comments, p. 59):

> **There are 237 UHF stations and 93 educational stations either operating or with outstanding construction permits or for which applications are pending in communities or metropolitan areas with a total population of over 112 million. The cities and metropolitan areas with CATV systems operating, pending, or applied for account for at least 85 million people. At least 145 communities or standard metropolitan areas with UHF stations operating, authorized, or applied for also have CATV activity. In 68 such communities or metropolitan areas where there are already operating CATV systems; at least 67 have CATV systems franchised but not operating, and at least 93 have CATV applications proposed.**

34. The situation in central Illinois is described by Midwest Television, Inc. (Midwest), licensee of VHF station WCIA, Champaign, Ill.; UHF station WMBC–TV, Peoria, Ill.; and applicant for a new UHF station in Springfield, Ill.[19] Midwest states that CATV is in process of growth in virtually all of the major communities served by WCIA, including Champaign and Urbana themselves.[20] Franchise applications have been filed or proposed in at least 12 communities within the WCIA grade B service area, and CATV systems are operating, under construction, or franchised in some 15 more. These 27 communities have a total population of 464,500—nearly one-half of

[18] According to AMST, table 2 is limited to the central communities or metropolitan areas where there is UHF activity, and does not include CATV activity elsewhere within the service area of a station located in the community or metropolitan area.

[19] Midwest is also the licensee of KFMB, San Diego, Calif.

[20] Champaign has one VHF and one UHF station, and is also the location of a UHF translator of a Decatur UHF station.

236-331 O—66——5

the total population within WCIA's grade B service area. Within the grade B service areas of WMBD–TV, Peoria, and of W71AE, Midwest's La Salle translator, CATV is at various stages—from franchise proposals to actual operation—in at least five communities, including Peoria itself (which has three operating UHF stations and a vacant UHF commercial assignment). The total urban population of these five communities is 221,294—between one-third and one-half of the total population in the grade B service areas of WMBD–TV and the La Salle translator. In Springfield (which has one operating UHF station and applications pending for two new UHF stations), applications for CATV franchises are under active consideration in Springfield and another community located in the grade B contour of both proposed UHF stations. The total urban population of these 2 cities is 92,072—approximately one-half of the total population within the grade B contour of Midwest's proposed new UHF station. Midwest states that the proposals for CATV in Springfield, Peoria, Champaign, and Urbana have all been announced since April 23, 1965, and that at least eight new CATV operators filed applications for local franchises in central Illinois during the first 2 weeks of July.

35. A description of CATV growth in the Rio Grande Valley of Texas is given by Mobile Video Tapes, Inc., the licensee of KRVG–TV in Weslaco-Harlingen, Tex. According to Mobile Video Tapes, Weslaco has a 1960 census population of 15,649 and the population of the Harlingen-San Benito urbanized area is 61,658. It states that J. Walter Thompson Co. (*Population and Its Distribution, The United States Markets*, 8th ed., 1961), lists the Brownsville-Harlingen-San Benito market (which includes Weslaco) as a class "C" market, the 143d market in the United States, with a population of only 151,098. The ARB total net weekly circulation of KRGV, as of March 1964, was only 75,100 homes. CATV franchises have been granted in five towns within its service area and other CATV systems are proposed. The communities with CATV franchises, their populations, and the grade of KRVG coverage are given by Mobile Video Tapes as follows:

Community	1960 census population	KRGV coverage
Brownsville	48,040	Grade A.
Edinburg	18,706	City Grade.
McAllen	32,728	Grade A.
Mission	14,081	Grade B.
Pharr	14,106	City Grade.

Mobile Video Tapes points out that this "constitutes the heart of the market—84.4 percent of the population shown by J. Walter Thompson for the entire Brownsville-Harlingen-San Benito market."

36. It appears, moreover, that there is significant CATV activity in the vicinity of fairly large cities with multiple channel assignments. The AMST comments (attachment C, tables IA, B, and C)[21] tabulate the CATV systems in operation, franchised or applied for within the

[21] Corrections to these tables were supplied in an "addendum" to the AMST comments submitted on Aug. 12, 1965.

grade A and B contours of existing or potential VHF and UHF stations in 11 areas "believed to be centers of considerable CATV 'activity'": Bakersfield and Sacramento, Calif.; Orlando and St. Petersburg, Fla.; Rockford, Ill.; Evansville and Indianapolis, Ind.; Rochester and Utica, N.Y.; and Columbus and Dayton, Ohio. The extent of CATV penetration is detailed in tables IA, B, and C. All three give separate figures for grade A and grade B contours, for VHF and UHF respectively. Table IA shows the penetration in terms of number of places in which CATV franchises have been granted or applied for. Table IB gives the equivalent data in terms of potential CATV households[22] compared with the total number of households within broadcast contours. Table IC converts the data in IB to percentages of total number of households within the broadcast contours.

37. The analysis shows that in these 11 areas there are approximately 230 places in which a CATV system was operating, franchised, or proposed (as of July 8, 1965) within the grade B contours of existing or potential VHF and UHF stations located in the central community of each of the 11 markets. These 230 places contain nearly 1,900,000 households. In Bakersfield, Calif., an all UHF market, almost two-thirds of the potential UHF audience is already franchised to CATV systems. In Utica, N.Y., the figure is 44 percent. If already submitted or proposed applications result in franchises, a UHF station in Columbus, Ohio, would have CATVs potentially competing for 60 percent of its market and a VHF station for more than half. Existing and pending CATVs in the Indianapolis area involve half the VHF market and about three-fifths of the UHF market. In Sacramento, the CATV potential comes to over 40 percent of the UHF market and nearly half the VHF.

38. There is also widespread CATV activity within major cities. Our attention has been called to the asserted intent of CATV interests to wire up "almost all American cities—small and large" and 85 percent of all television sets—40 million homes.[23] The December 1965 issue of Television Magazine (vol. 22, No. 12) states that franchise applications have been filed in San Francisco, Seattle, Pittsburgh, Baltimore, Fresno, Columbus, Tucson, Birmingham, Providence, and Sacramento. Two of the commenting parties in this proceeding are applicants for CATV franchises in Philadelphia. The comments of Columbia Broadcasting System (CBS) refer to applications for CATV franchises in Albany and Syracuse, N.Y.; Galveston, Tex.; and the grant of a CATV franchise in Wilmington, Del. D. H. Overmyer, permittee of new UHF station WDHO–TV in Toledo, Ohio, comments that local authorities have granted a CATV franchise for that city since the issuance of the joint notice herein. Toledo has two VHF stations, a UHF educational station, and—according to Storer Broadcasting Co., receives the signals of four Detroit-Windsor VHF stations, off the air and without reception difficulty. Telerama, Inc., an applicant for a CATV franchise in Cleveland, has filed comments describing

[22] The tables use potential, rather than actual audience, i.e., the total number of households within the broadcast contour, and the total number of households in the community of the CATV.

[23] Address by Milton J. Schapp, "CATV—Past, Present, Future," Dec. 8, 1964, reprinted in Television Digest special supplement, vol. 4, No. 50, Dec. 14, 1964, p. 1.

its proposed cable operation for that city which has three VHF stations, a UHF educational station, and applications pending for two new UHF facilities.[24] Taft Broadcasting Co., in a June 1965 petition to deny a microwave application (file No. 6226–C1–P–65) to bring the three New York independent stations to CATV systems in the Wilkes-Barre-Scranton area of Pennsylvania, states that in the last 6 months 90 franchise applications have been filed in 54 communities in Lackawanna and Luzerne Counties. The Scranton-Wilkes-Barre area is served by three UHF stations, providing three full network services.

39. The most factually detailed comments on big city CATV were submitted by Midwest Television, Inc., licensee of station KFMB–TV in San Diego, Calif. According to Midwest, CATV is growing with great speed in the San Diego area, which is presently served by three VHF stations providing the programs of all three networks.[25] In addition, construction permits are outstanding for two new commercial UHF stations in San Diego and an application is pending for a UHF educational station. Since March 1963, when the first CATV system in the area was franchised, seven additional systems have been franchised. All eight CATV systems are within the grade A contour of KFMB–TV, which falls within the Metropolitan San Diego area; four are located in San Diego itself. While four of the eight systems are not yet operative, two of these are expected to begin operations momentarily. The operating CATV systems, which do not use microwave, carry the signals of all seven Los Angeles commercial VHF stations and carry the local stations without affording nonduplication protection. Midwest has been unable to obtain the current subscriber count, estimated at approximately 10,000 homes in February 1965.[26] However, its engineering personnel recently counted drops in a part of San Diego where CATV had been available for only 3 months. Of the 159 homes in that area, 58 were wired for CATV—and this, Midwest points out, "is an area where all three stations can be satisfactorily received" (Midwest comments, p. 24).

40. The Midwest comments also describe what it considers to be the effect CATV operations of this nature have on the audience of the local network-affiliated stations. Southwest Surveys, an independent research organization, conducted a survey for Midwest in June 1965, interviewing 300 CATV subscribers and 300 nonsubscribers in the San Diego area. Forty-three percent of the CATV subscribers had been subscribers for less than 3 months. Midwest states (comments, p. 9) that during the prime evening hours of 7:30 p.m. to 11 p.m., when most of the programs broadcast by the three San Diego area stations were network programs, the San Diego area stations accounted for 88

[24] Telerama plans to carry all local stations and two Canadian stations on a full-time basis and to carry on a part-time basis on the remaining channels the signals of network affiliated stations in Detroit, Toledo, Erie (Pa.), and Youngstown and Akron, Ohio. While it does not propose to acquire microwave facilities to bring in Chicago and New York independent stations, Telerama states that if these signals are made available to the Cleveland area by common carrier facilities, "then Telerama may avail itself of the accessibility to such signals." Since Telerama submitted its comments, Cleveland has granted a franchise to Telerama.

[25] Midwest's station KFMB–TV is a CBS affiliate, KOGO (San Diego) is an NBC affiliate, and the third station, XETV (located in Tijuana, Mexico, just a few miles from San Diego), is an ABC affiliate.

[26] San Diego Telecasters, Inc., permittee of UHF station KAAR–TV in San Diego, estimated as of Aug. 25, 1965, that there are "more than 15,000 sets now served by cable."

and 97 percent of the total viewing time of non-CATV subscribers interviewed in two different areas and only 62 percent among cable subscribers. During the hour from 9 p.m. to 10 p.m., Sunday through Wednesday, when each program broadcast by each of the San Diego area stations was simultaneously duplicated on CATV by Los Angeles stations, 93 percent of the nonsubscribers saw them on local stations whereas only 77 percent of the cable subscribers did so (pp. 9–10). Of the cable subscribers, 49 percent reported that they viewed a San Diego channel most; 55 percent named a Los Angeles channel. Of the nonsubscribers in two separate areas, San Diego stations were named by 108 and 94 percent, respectively, while Los Angeles stations were named by only 5 and 11 percent (id., p. 25).[27]

41. With respect to nonnetwork viewers, Midwest states that 25 percent of the CATV subscribers named a Los Angeles independent station as the channel they viewed most and only 1 and 2 percent, respectively, of the two groups of nonsubscribers did so. More than 56 percent of the CATV subscribers (as compared to 11 percent of the nonsubscribers) named at least one Los Angeles independent as one of the three stations most viewed (id., p. 26). During the period 5 p.m. to 6 p.m., Monday through Friday, there was no duplication by any Los Angeles station of programs broadcast in San Diego and the cable subscriber could watch any one of 10 different programs. Among nonsubscribers interviewed, 95 percent of those who watched television during that hour watched one of the San Diego stations. Among cable subscribers the Los Angeles stations accounted for 52 percent and the San Diego stations 48 percent (id., pp. 26–27).

42. Moreover, appended to the comments of Columbia Broadcasting System (CBS), which is opposed to an assertion of jurisdiction, is a further study of CATV prepared by its office of economic analysis. The CBS study points out that there is a timespan lag before CATV impact is felt (CBS comments, exhibit A, p. 27). This is partly because CATV penetration does not occur all at once; growth is gradual. But CBS also states that networks react slowly to changes in station audiences and that it might take 3 to 5 years for a change in an affiliate's audience to be reflected fully in the relative network rate. National spot revenues and local advertising, while reacting more quickly, would still take a considerable time. The study concludes (p. 31) that the "true reasons for the modest impact of CATV thus far are the relatively small amount of penetration that CATVs generally have in any particular market and the considerable length of time necessary for the effects of CATV to work themselves out." [28]

43. Like the Seiden report, the CBS study bases its discussion of CATV potential and impact on CATV systems operating or franchised as of August 1964. It concludes, therefore, that CATV potential is limited to communities more than 40 miles from three stations providing the service of the three networks (plus some metropolitan

[27] Percentages total more than 100 percent because some multiple answers were given.
[28] AMST argues that this timelag is not as great as CBS asserts. It states (reply comments, p. 22): "However long before an affiliate's network rate card is affected, advertisers will inevitably drop from network orders those stations which show serious audience losses, whether from CATV or any other cause. That this is the likely sequence is demonstrated by the parallel situation—network radio, which felt the impact of television by sharp decreases in station orders long before those stations' network rates were affected."

area apartment-house dwellers), an estimated 6–8 million TV homes. However, the study recognizes (p. 14) that CATV "systems are clearly moving closer to transmitting points" and states further (pp. 16–17):

> There is a final caveat that must be made at this point. There has been in the very recent past, and not included in the systems in our study, a group of applications for CATV systems in communities with three more than adequate network services which do not appear to be related to apartment-house reception problems. Thus, applications for franchises have been made in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland, and a franchise has just been granted in Wilmington, Del. * * * While these do provide alternative programing, we do not know as yet whether this added factor will be sufficient to make the systems viable. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have talked about thus far and, in fact, much of the country could ultimately become CATV territory."

44. In view of the rapidly changing circumstances outlined above, we can see no point in conducting a further factfinding inquiry with respect to nonmicrowave CATV as it has existed in the past. The extensive studies conducted by Dr. Fisher, Dr. Seiden, and NCTA in conjunction with dockets Nos. 14895 and 15233,[29] and further studies of CBS and AMST in this proceeding, all concerned nonmicrowave as well as microwave CATV systems. Studies of this nature are out of date almost before we have had time to consider them. Moreover, they are of limited value since they cannot measure some of the most important factors we are bound to consider. These include the cumulative future effect of greater penetration by CATV systems franchised or applied for but not yet in operation, the degree of success to be achieved by CATV systems in big cities or other well-served areas, and the effect of the burgeoning CATV activity—if left unregulated—on the decisions of potential applicants and existing licensees as to whether to inaugurate or improve service.[30]

45. What we said in the first report and order in rejecting NCTA's argument that regulatory action should not be taken in the absence of a showing that stations have ceased operation, or are about to cease operation, applies with equal force to its renewal of that argument here.[31] We stated (par. 77):

---

[29] See, e.g., pars. 20 and 32 of the first report and order in dockets Nos. 14895 and 15233, and p. 49 of the Seiden report.

[30] The CBS study further asserts (pp. 27–30) that the effects of a rise in CATV penetration with its depressing effect on station revenues are offset in large degree by the persistent rise in advertising demand for television time. However, as AMST points out, the number of stations sharing the advertising demand is also increasing as new UHF stations stimulated by the all-channel law commence operations. Moreover, annual broadcast expenses are on the average increasing apace with revenues.

[31] While the distant signal procedure adopted in pt. II will probably have some effect on the trends we have been here discussing, we think that application of the carriage and nonduplication requirements to all systems is still required in the public interest. First, not only will this end the present unwarranted discrimination between the microwave and nonmicrowave system, but it is called for on the basis of the fair competition ground, discussed in pars. 26–27. Second, as to the economic-impact ground we note that in view of recent growth, there are a very substantial number of CATV systems operating on the date of release of this report with the capacity to keep growing to perhaps 50–70 percent of the television homes in their communities, and thus to have a cumulative effect in areas such as those noted in the prior discussion (e.g., pars. 35–37). New systems will continue to come into operation under the interim procedure, and it may be important that the cumulative effect of such systems, after growth to significant figures, be ameliorated to some extent by the carriage and nonduplication requirement. Most important, the distant-signal procedure is of interim nature, subject to discontinuation or revision. See par. 150. The carriage and nonduplication rules which we adopt here are not interim—they are our best judgment of what the public interest calls for over an indefinite period.

NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above, it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. In short, we must plan now for the healthy coexistence of CATV and local stations and safeguard the public from future injury. Circumstances have changed since our 1959 report and order, and the likelihood or probability of adverse impact upon potential and existing service has become too substantial to be dismissed. If studies are in conflict and present a close question as to the precise extent of the impact, it is not close as to how this uncertainty should be resolved. This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of insuring the healthy growth and maintenance of the basic service.

46. In sum, we have concluded in the first report and order in dockets Nos. 14895 and 15233 that the public interest requires that CATV systems carry local stations without duplication for a reasonable period, in order to avoid unfair competitive disadvantage to and prejudicial effect on existing and potential broadcast service. We have concluded herein that we have authority under the present provisions of the Communications Act to extend these requirements to nonmicrowave systems. In view of the rapid surge in CATV growth since this proceeding was initiated, we think that our statutory obligations require us to act now in the areas we have proposed. This will end the present unwarranted distinction between microwave and nonmicrowave systems, and will enable us to make the rules effective before operations are commenced by a large number of CATV proposals presently in the franchise or application stage.

C. Substantive Provisions of the Rules

47. CATV systems, as we recognized in the first report (pars. 43, 48) and here again emphasize, have arisen in response to public need and demand for improved television service and perform valuable public services in this respect. CATV (like other auxiliary television services) makes possible the provision of a variety of program choices, particularly the three full network services, to many persons in areas with no local station and in one- and two-station markets. CATV systems also afford a means of providing nonnetwork commercial and educational services to many persons in areas with insufficient population to support local broadcast outlets of this nature. CATV systems make important contributions by providing good quality reception of color signals and improving reception of local signals in areas within the predicted contours of local stations where off-the-air reception is inferior or precluded because of terrain, manmade structures, or other factors. We do not intend to deprive the public of these important benefits or to restrict the enriched programing selec-

tion which CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the act), both those who are cable viewers and those dependent on off-the-air service. The new rules discussed below are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service.

48. To insure effective integration of CATV within a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses and those which receive their signals off the air.[32] We have carefully reexamined the CATV rules currently in effect for microwave-fed systems, and have made some changes. The microwave rules will be revised to reflect the new rules adopted for all systems.

49. In brief, under the new rules, a CATV system will be required, upon request and within the limits of its channel capacity, to carry without material degradation the signals of all local television stations within whose grade B contours the CATV system is located, in order of priority of signal grade. A CATV system will be required, upon request, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs are broadcast by the local stations. This nonduplication protection, as under the existing rules, will apply to "prime time" network programs (i.e., presented by the network between 6 and 11 p.m., eastern time) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Nonduplication protection will not be afforded to programs which are carried in black and white by the local station and are available in color from a more distant station on the CATV system. Ad hoc consideration will be given to petitions from local television stations seeking a greater degree of protection than provided by the rules, or from CATV operators seeking a waiver of the rules, and we are adopting procedures to facilitate such petitions. Moreover, the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules.[33]

50. Thus, the carriage requirements made applicable to all CATV systems will be substantially the same as those applied to microwave-served systems by the Commission's first report, except in certain minor respects discussed in paragraphs 74 and 83 below. However, the new nonduplication rules embody two substantial changes from those adopted in the first report. First, the time period during which nonduplication protection must be afforded has been reduced from 15 days before and after local broadcast to the single day of the local broadcast. Second, a new exemption from the nonduplication require-

[32] Excluded from these rules will be those CATV systems which serve less than 50 subscribers, or which serve only as an apartment-house master antenna.

[33] Private agreements will not avoid the necessity for evidentiary hearing for the importation of distant signals into the top 100 markets (pt. II, below), though such agreements will be considered in our decision.

ment has been added as to color programs not carried in color by local stations. We shall discuss the nonduplication changes first because they are of a major nature.

1. The nonduplication provisions

51. *Modification of the nonduplication period.*—Nonduplication at the same time that a local broadcast is being carried on the cable is clearly called for in the public interest for the reasons discussed above and in the first report. Simultaneous nonduplication protects the bulk of the popular network programing of most network affiliates and does not affect the time that such programing is available to the CATV subscriber. In the first report we further determined that some measure of protection beyond simultaneous nonduplication would also serve the public interest on a number of grounds. We shall not repeat here the reasons set forth in the first report for that determination or for the further judgment that a 15-day before-and-after period was appropriate.

52. We have reconsidered the latter judgment and have decided to strike a different balance in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public. The systems which will now operate under the rules for the first time constitute the great bulk of the CATV industry. In addition to all nonmicrowave systems, they include a sizable number of microwave CATVs served pursuant to authorizations granted prior to December 1963 when the interim condition procedure began. We recognize that the imposition of a 15-day before-and-after nonduplication requirement on systems which have not previously operated in this manner would tend to substantially disrupt the viewing habits of the CATV subscribers. As NCTA points out (NCTA comments, exhibit B, pp. 35–38), there is no question but that large numbers of CATV subscribers have become accustomed to viewing network programs at the time they are presented by the distant affiliates. Although 15-day before-and-after nonduplication was not required where timeliness was important, and all distant city programs deleted under the rules would have been available to the CATV subscriber via the local signal at some time within the total 30-day period, the CATV viewer might not be able to view it on the later date of presentation by the local station for any number of personal reasons.

53. We believe it desirable to avoid disruption to the established viewing habits of the public as much as possible. Moreover, we are seeking to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programming and a wider selection of programs on any particular day. Balancing all the pertinent considerations, we think that the nonduplication period should be reduced to the same day for existing systems. Not only will this eliminate the great bulk of delayed nonduplication requests (see par. 125, first report), but it will insure that the program is available to the CATV audience that same day and, in the case of network prime-time programs, that same evening. While not wholly eliminating any possible change in viewing time on the pertinent day, this revision clearly minimizes any disruptive effect on

the CATV viewer. As an incidental benefit, we note that same-day nonduplication will substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules, and to this extent will facilitate ease of administration.

54. Application of a 15-day before-and-after nonduplication provision to new systems would not, of course, cause a similar disruption to established viewing habits, since the CATV subscriber would from the beginning receive service in accordance with the rules. It would be possible to "grandfather" existing systems on a same-day nonduplication basis and make 15-day nonduplication effective only as to new systems. But there are a number of countervailing arguments. First, even in the case of the new system, there is disruptive effect to the extent that the CATV subscriber may not be able to view programs from distant stations at the times specified in his TV guide (and may be unable to view them at the later date presented by the local station for any number of reasons). It is our understanding that it is essentially for that reason that some broadcasters, although previously entitled under our microwave rules to 15-day before-and-after nonduplication protection, have requested only simultaneous nonduplication. Second, it is obviously preferable to have one set of rules for all systems and thus to avoid the anomalous situation of millions of CATV subscribers viewing under one set of rules and other millions, often neighbors in close-by communities, subjected to a different set. Under the circumstances, we think it better to provide by rule for same-day nonduplication for all systems, and to safeguard the public interest in the particular instance warranting different treatment pursuant to the ad hoc procedures discussed in paragraph 97 below.

55. We also considered the question of retaining the 15-day before-and-after nonduplication provision for nonnetwork programing. But, as we have previously recognized, and indeed stress in this report (pars. 123, 131, infra), 15-day before-and-after nonduplication affords, at best, only minimal protection with respect to the presentation by local stations of syndicated and film programing. Such programing is not presented on a nationwide simultaneous or even nearly simultaneous basis. Retention of the 15-day provision for nonnetwork programs alone would serve little effective purpose. Stated differently, the adoption of a uniform "same day" rule will not, in our judgment, significantly affect the protection afforded as to nonnetwork or independent programing. Rather, we have determined that we must look elsewhere if we are to achieve effective relief in this respect. We treat the situation of the independent station in part II below.[34] As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of section 325(a) to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program marketplace. Here again, we shall consider requests seeking more extensive protection of nonnetwork programing on an ad hoc basis to

[34] With "same day" nonduplication affording substantial protection to the most popular network programing, most network affiliated stations should be viable.

insure that the public interest is not prejudiced in the unusual situation (although, as stated, we are unaware of any instance where the 15-day period afforded effective relief in this respect).

56. While conflicting considerations are presented, we believe that our resolution constitutes a fair compromise. First, same-day nonduplication is clearly sufficient to take care of the time zone differential problem, i.e., to preclude a CATV system, which brings programs across either border of the mountain time zone, from duplicating most, if not all, of a local station's network programs an hour or two before or after they are presented locally. Moreover, it will afford the station affiliated with more than one network some leeway in presenting what it regards as the most attractive programs of each for the benefit of the non-CATV audience (and also, the CATV audience—see par. 115, first report) so long as such programs are presented on the same day as the network presentation and prime-time programs are broadcast entirely within prime-time hours.[35] This will, as stated, minimize any disruption to the CATV subscribers. In addition, we will consider requests by local stations and CATV systems for different treatment on an ad hoc basis, pursuant to the summary procedures discussed in paragraph 97, where possible, or by evidentiary hearing if necessary. Thus, the station which receives its network programing by mail, or the station or system which faces some other unusual problem, can bring its situation to our attention for such relief as may be appropriate in the individual circumstances and warranted by the public interest. Similarly, the CATV system can seek a waiver of the rules. We stress, in addition, that the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules. We believe that the above resolution fairly serves the public interest. If further revisions are needed on the basis of our experience with these new provisions, we shall of course move promptly to implement such revisions.

57. Our decision to adopt same-day nonduplication makes appropriate some other revisions in the exclusivity sections of the rules. First, however, we stress those provisions which remain unchanged. We shall retain the provision requiring the local station to present prime-time network programing entirely within prime-time hours in order to be entitled to nonduplication.[36] Thus, the CATV system

[35] In this connection, we note that the amount of delayed network broadcasting in the median one- or two-station markets is about 5½ and 11 hours per week, respectively. See par. 108, first report. While this amount is not insignificant and we recognize that there will be some detriment to the public if the local station in the median market curtails delayed broadcasts because of the absence of nonduplication protection, we point out that the amount of delayed broadcasts is not of too large a nature in the median market, and that we would not expect the local station to cease all delayed broadcasts in the absence of delayed nonduplication protection. Moreover, the pending liberalization of our translator policies may result in greater availability of off-the-air service in one- and two-station markets.

[36] AMST has requested elimination of the exception for prime-time programs broadcast outside of prime-time hours. AMST urges that this provision is unnecessary because it is normally in the best interests of the station to carry prime-time programs in prime hours and the Commission has ample power to remedy any abuse. It is further asserted that there may be instances where a station reasonably desires, and has network consent, to carry such programs at other hours. However, a prior CATV presentation does not preclude the station from repeating the program outside of prime time if it has good reason to do so, and it is unlikely that instances of this nature would arise often enough to make the loss of exclusivity a significant problem. Since the provision is designed to insure that CATV subscribers have prime-time programs conveniently available in the hours of maximum viewing, the public interest is best served by its retention.

need not delete reception of any network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but which is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for the network programing in the time zone involved. This will insure that such programs are available to the CATV subscribers in maximum viewing hours. We shall also retain the provision that the CATV system need not delete reception of any program as to which time of presentation is of special significance, such as a speech or sporting event, except where the program is being simultaneously broadcast by the local station. And, although it is of greatly reduced significance for same-day nonduplication, we shall retain the provision that the CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusively is being protected pursuant to the requirements of the rules).

58. However, there no longer appears to be any real necessity for the provisos to sections 21.712(g), 74.1033(e), and 91.559(e), i.e., that:

> (1) The system is not required to maintain the exclusivity of the network programing of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicates the network programing of the station requesting exclusivity; and
>
> (2) The system is not required to maintain the exclusivity of the nonnetwork programing of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operates in what are normally and usually considered other markets for purposes of television program distribution.

These provisions were grounded in the 15-day before-and-after nonduplication period which protected network programs delayed substantially beyond the date of network presentation and protected nonnetwork programs for a total of 30 days. In view of same-day nonduplication, we shall provide simply that higher priority signals carried on the system are entitled to exclusivity against lower priority or more distant signals but not against signals of equal priority.[37]

59. *Color duplication.*—In the first report and order in dockets Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (par. 143). However, we did not there determine whether such an exception should apply across the board or whether the CATV system should be required to make a threshold showing that a certain number or percentage of its subscribers possess color receiving sets. Comment on this question was invited in this proceeding.

60. Most of the comments, from broadcast and CATV interests alike, favor permitting color duplication on an across-the-board basis.

---

[37] Though these modifications stem from our action in shortening the nonduplication period, we note that changes of this nature were requested by AMST and ABC under the 15-day before-and-after nonduplication period.

No one has supported the proposed alternative of requiring a threshold showing by the CATV system. It is urged that it is in the public interest for color programing to be available to as many persons as possible, and that this should be encouraged by the Commission pursuant to section 303(g) of the act. The few comments opposed to making an exception for color claim that it is unnecessary. They assert that most stations not already equipped to present network programs in color will acquire such equipment now that all of the networks have commenced a significant degree of color transmission. It is further asserted that the exception would penalize smaller stations lacking financial resources to convert to color.

61. In light of the comments, we have decided to permit color duplication of local black and white transmissions without requiring any threshold showing by the CATV system. It may be that most stations will shortly be equipped to present network programs in color. But in that event the broadcasters have no real cause for complaint in the adoption of a provision which will not adversely affect them. We think that the exception is in the direction of encouraging the wider distribution of color programing and that it is consistent with the supplementary role of CATV. Any local station finding itself at a significant disadvantage can install equipment for the transmission of network color programs "at relatively little expense" (comments of American Broadcasting Co.), which would benefit its non-CATV viewing public. Hardship situations may be brought to the Commission for such relief as may be warranted by the station's showing. Accordingly, the rules governing microwave-served CATVs will be amended in this respect and the exception will be incorporated in the rules adopted for all systems. The exception will also apply where a local station is equipped for simultaneous color transmission of network programs, but delays a color program for later presentation on the same day by means of black and white video tapes.

62. Some of the CATV comments urge us to go further and permit duplication of local colorcasts where a CATV system makes a showing that the technical quality of the local signal is substantially inferior to another signal. While we would, of course, consider any such showing on a case-by-case basis, we have no reason to anticipate any widespread problem warranting action by rule. We expect that valid complaints of this nature will be rare. In most instances the technical quality of the local signal should be sufficiently good to permit satisfactory color reception on the cable if the CATV system and the station cooperate in good faith to accomplish this result. We would expect good-faith efforts by both to resolve any technical problem before any complaint is made to the Commission.

63. *Other changes in the nonduplication provisions suggested by the parties.*—The comments of NCTA (exhibit B, pp. 35–38) assert that last minute program changes by the local station require the CATV operator to bear the labor costs of a manually controlled switching device or to punch a new tape for the remainder of the week where an automatic switch is used. While this assertion was made in the context of the delayed nonduplication provision, we think that the broadcaster should afford the CATV sufficient advance notice of non-

duplication requests to permit the CATV system to make its program schedule available to subscribers and to set an automatic switching device only once for the entire week.' Accordingly, we shall amend section 21.712(h), 74.1033(f), and 91.559(f) to require that the station, upon request of the CATV operator, shall give notice under these sections at least 8 days prior to the broadcast to be deleted. Since same-day nonduplication affects principally network programs, which are ordinarily presented at the same time each week during the network season, this amendment should pose no difficulty for the station.[38] Indeed, in most instances it would appear that such notice could be given at the start of the network season and continued in effect until further notice occasioned by changes in the schedule of the network or the local station.

64. AMST urges that the rules be modified to provide nonduplication protection to local stations which are not carried on the cable—either because no request has been made or because of the limited channel capacity of the system. It states that carriage has no essential relationship to nonduplication and should not be a condition of the latter. We cannot agree. If nonduplication were afforded where the local station is not carried, the CATV subscriber would, in some instances, be greatly inconvenienced and, much more important, in others be deprived of all opportunity to view the programs involved. See paragraph 51, first report. This is not the purpose or effect of the rules as written, nor would it serve the public interest. As set forth in paragraph 68 below, the better procedure where the system's channel capacity is too limited to permit full carriage of the local station is to substitute its programs for the duplicating outside signal. Partial carriage would retain the availability of the programs to CATV subscribers and at the same time afford the station some measure of protection.

65. Other changes in the nonduplication provisions requested by AMST and ABC have been rendered moot by our action in shortening the nonduplication period to 1 day and the modifications we have made in that connection. Accordingly, we shall not discuss their contentions in this respect. The comments with respect to nonduplication of noncommercial educational stations are discussed in a separate section on educational television (sec. 4 below).

2. The carriage provisions

66. We shall, as stated, apply to all CATV systems substantially the same carriage requirements as were adopted for microwave-served systems in the first report.[39] Thus, within the limits of its channel capacity, a CATV system will be required to carry the signals of all commercial and educational television stations within whose grade B contour the system is located, giving priority: First, to principal community signals; second, to grade A signals; and third, to grade B signals. The CATV system need not carry the signal of any station,

[38] It has come to our attention that the requesting station may have difficulty in giving notice where the CATV does not always carry the same signals. Where a CATV system varies the signals carried, it should provide the local stations with a copy of the CATV schedule in sufficient time to permit the station to give notice of the programs to be deleted.

[39] There are, however, changes stemming from our resolution of the translator question (sec. 3 below).

if (1) that station's network programing is substantially duplicated by one or more stations of higher priority, and (2) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station. Moreover, in cases where (1) there are two or more signals of equal priority which substantially duplicate each other, and (2) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations. Where a signal is required to be carried, it shall be carried without material degradation in quality, and shall be carried in full except to the extent that nonduplication of higher priority signals may be required under the rules. Upon request of the local station, the signal shall be carried on the system on the channel on which the station is transmitting (where practicable without material degradation) and on no more than one channel. Where a system is not carrying the signal of a grade B or higher priority station, it shall offer and maintain for each subscriber a switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber indicates in writing that he does not desire this device.

67. *Modifications requested by the parties.*—Some of the parties have requested changes in these provisions. Thus, NCTA urges that CATV subscribers see no reason why out-of-State stations should be regarded as local. It asserts that CATV systems should have the option to carry more distant signals originating within the same State in preference to out-of-State stations placing a grade B signal over the community. We agree that there may well be instances where the programing of stations located within the State would be of greater interest than those of nearer, but out-of-State stations—e.g., coverage of political elections and other public affairs of statewide concern. We recognize also that there may be instances where out-of-State stations located in another State are of greater community interest than the geographically nearer out-of-State stations because of closer community ties with the third State. Considerations of this nature will be accorded substantial weight as a basis for waiver of the carriage provisions.

68. In this connection, we emphasize that we intend to make every effort, consistent with the public interest, to avoid disrupting existing service to the public in applying the carriage provisions of the rules to systems now in operation.[40] Where, because of limited channel capacity, a CATV system cannot carry all grade B signals without dropping a more distant signal now being carried, we shall entertain a request for waiver of the rules pursuant to the summary procedures discussed in paragraph 97 below and upon the basis of the showing specified in paragraphs 104, 106. In appropriate circumstances, waiv-

[40] As in the case of our present policy with respect to microwave systems, carriage will not be required where a sufficient showing is made that a predicted signal is not in fact present in the community, or that a good signal is not obtainable because of technical deficiencies on the part of the station.

ers will be granted, which will permit the system to continue to carry the distant signal and to substitute the nearer signal only where simultaneous duplication would occur. Thus, upon such waivers the CATV viewers would continue to receive all programs to which they were accustomed, via the more distant signal when the programs are different and via the local signal when the programs are the same. New systems can commence operation with a channel capacity sufficient to carry both the local and the distant signals; indeed, most new systems now commence operation with 12-channel capacity.

69. Section 21.712(f)(2), section 74.1033(d)(2), and section 91.559(d)(2) presently provide that where a signal is required to be carried, it "shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation)." WJAC, Inc., and WKBH Television, Inc., urge that carriage on channel should be a matter for the station's choice. According to WJAC, the station should be entitled both to insist that its signal be carried on another channel, and to select the channel of a lower priority or nonlocal station. AMST claims, on the other hand, that carriage on channel is extremely important and should be mandatory unless the CATV makes a compelling showing that this is not technically feasible without degradation. It states that the CATV should be required to take all reasonable steps to eliminate material degradation which may result from the CATV equipment used or inadequate installation.

70. Since sections 21.712(f)(1), 74.1033(d)(1), and 91.559(d)(1) already provide that the "signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art)," we do not think that any change in subsection (2) is called for. The requirement for onchannel carriage is only operative upon request of the station licensee or permittee. If this results in material degradation, the station can request carriage on another channel. Moreover, if the channel capacity of the system is such that some signal must suffer material degradation, the inferior signal obviously should not be that of a higher priority station. First report and order in dockets Nos. 14895 and 15233, paragraph 135. However, no reason appears why it is necessary for the station itself to select the alternative channel. So long as the requirements of the rules are met, the CATV operator should be free to decide how the channels on its cable are to be utilized.

71. AMST further asserts that the CATV system should not have complete discretion under sections 21.712(d)(2), 74.1033(b)(2), and 91.559(b)(2) to select among substantially duplicating signals of equal grade where noncarriage of one or more is necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations. It urges that the rule should be modified to set forth reasonable standards for selection, such as the respective distances of the stations from the community, relative signal strength, respective audiences in the community—as measured by audience surveys, terrain considerations, and the like. We recognized in the first report and order in Dockets Nos. 14895 and 15233, paragraph 91, that leaving the selection to the CATV's discretion makes possible "dis-

crimination between local signals in some instances." We further stated that we would closely examine complaints of abuse, particularly where the CATV operator has an ownership or other interest in one of the duplicating channels. We shall also give particular consideration to any allegation that the station not carried is one with closer community ties. The criteria suggested by AMST would not do away with the necessity for case-by-case resolution of complaints. AMST concedes (comments, p. 20) that any criteria for determining priority should not be inflexible and that an opportunity should still be provided for the submission of other data to the Commission. In the circumstances, it seems preferable to retain the rule in its present form until experience in its administration demonstrates what refinements might be needed or appropriate.

72. AMST also claims that exclusion of nearby network-affiliated stations in order to bring in distant independent stations which do not place a grade B signal over the community of the CATV, should not be permitted since "this would drastically affect the normal off-the-air competitive pattern of television service" (AMST comments, pp. 20–21). This provision is admittedly a "compromise approach," recognizing both that a CATV system owes its primary duty to the stations that are closest and place the best signal over its community, and also that carriage of nonnetwork signals may contribute to the diversity of its service (first report and order in dockets Nos. 14895 and 15233, par. 89). The general questions of whether there should be some limit on the distance and number of nonlocal signals brought in, as well as the matter of "leapfrogging," are being considered in part II of this proceeding. Pending resolution of these matters, we shall retain the rule in its present form.

73. Next, AMST asserts that the installation of a switching device should be mandatory in all cases, whether or not the local signal is carried, so that the subscriber will not be foreclosed from off-the-air service where the cable system is inoperative or not operating properly. It is further urged that no exception should be made when the subscriber indicates in writing that he does not desire a switch, since the requirement could easily be avoided by a "small-print" waiver in the subscription contract. While these suggestions may have some merit, we do not think they warrant a revision of the rules. The rules are designed to protect local stations in areas which are crucial and essential to preserve and encourage service to the public. For the reasons stated in paragraph 51 of the first report, particularly that going to "sheer inconvenience of switching * * *," we do not view this area as one of great significance, requiring further revision.

74. A further change suggested by AMST does, however, appear to warrant modification of the rules. Sections 21.712(d)(3), 74.1033(b)(3), and 91.559(b)(3) now provide that where a CATV system operates within the grade B or higher priority contour of both a satellite station and its parent, carriage of one will relieve the system of any obligation to carry the other. AMST points out that this would allow a CATV system in, or very near to, the same community as the satellite to carry only the parent station, causing the satellite to lose audience for which it may be originating some local programing

and reducing its incentive to originate programs. It urges that satellites should be treated like any other station in accordance with the prescribed priorities. Since satellites operate on assigned channels and possess the potential to develop into regular stations, there is a strong public interest in encouraging them to do so. Accordingly, sections 21.712 (d)(3) and (g)(3), 74.1033 (b)(3) and (e)(3), and 91.559 (b)(3) and (e)(3), together with the note to those sections, will be deleted.

75. And, finally,[41] AMST suggests that CATVs be required to refrain from deleting or altering any portion (including advertising) of signals carried pursuant to the rules. Such a requirement is implicit in the carriage provisions and we would so rule upon complaint. The addition of an explicit provision does not appear necessary in the absence of some evidence of abuse. In this connection, we note that it is asserted in the comments of NCTA that some broadcasters who have requested systems to refrain from advance duplication of delayed broadcasts have later presented only a portion of the program. Since the CATV system is relying exclusively upon the signal of the local station to bring the program to its subscribers, the station has an obligation to present in full any program for which nonduplication is requested. Again, upon complaint we would rule accordingly. See also paragraph 158, first report. Moreover, same-day nonduplication will greatly reduce the likelihood of any incidents of this nature.

76. Accordingly, apart from the provisions relating to satellites and the changes occasioned by our disposition of the translator questions (sec. 3 below), the carriage requirements of the new rules will be the same as the provisions now governing microwave-served systems.

3. Translators

77. Part I of the notice in this proceeding (par. 36) requested comments on two questions concerning translators: (1) Whether CATVs should be required to carry and not duplicate the signals of station-owned translators operating beyond the parent station's grade B contour,[42] and (2) whether translators should themselves be precluded from duplicating the programs of local stations.

78. With respect to the first question, the parties have expressed diverse views. The CATV interests and some of the broadcasters argue against extending any protection to translators outside the grade B contour because such translators are operating outside the normal service area of the parent station, do not provide a local service or possess the potential for developing into regular local stations, and are relatively inexpensive to construct and operate. It is further asserted

---

[41] AMST also asks that the definition of substantially duplicating network programing (secs. 21.710(f), 74.1001(e)(6) and 91.557(f)) be modified to apply only to a situation where two or more stations are primary affiliates of the same network. While such a definition might have been equally acceptable as an original matter, we do not think that any difference between the two is significant enough to warrant redoing the rules at this point. An additional proposal of AMST that the substantially duplicated concept be retained only for purposes of carriage has in effect been granted in view of the matters discussed in par. 58 above.

[42] Under the rules adopted in dockets Nos. 14895 and 15233, station-owned translators located within the grade B contour are treated as extensions of the originating station (secs. 21.710(b), 74.1001(e)(2), and 91.557(b)). Such translators will be treated the same under the new rules.

that translators should not be protected because they may impede the establishment of local stations.

79. AMST, Storer Broadcasting Co., NAEB, and the Farm Bureau urge, on the other hand, that all translators (including those not station owned) should be carried in order to provide an incentive for the establishment of translators. Translators, they claim, should be encouraged because their service is received off the air free and covers a wider area than cable service. They would exempt translators from the carriage requirement where: (1) The CATV system is carrying the translator's parent station, (2) the CATV system is within the grade B contour of a station whose programing is substantially duplicated by the translator, or (3) the translator is supplying programing which substantially duplicates that of another translator whose originating station is closer. Nonduplication protection is not sought for the asserted reason that translators do not provide a local service or possess potential for developing into regular local stations.

80. We share the view that the public interest is served by encouraging expanded use of translators to bring television service to persons in rural areas and communities not now receiving adequate local television broadcast service. Apart from the fact that translator signals are received free and reach persons outside the urbanized areas served by CATVs, one of the major recommendations of the Seiden report was that increased consideration be given to the expanded use of translators. The report states (p. 22):

> Consideration should be given to the use of translators as a tool of structural policy. They require a substantially smaller investment than CATV and are compact, highly mobile, and can be sold in the secondary market. In general they provide the flexibility necessary in an industry in which structural policy must be kept free to adapt to technological and demographic change. Translators are ideally suited as a temporary communications medium, and their use should be required of broadcast licensees in fulfilling their obligations to the public by bringing their signal to all homes in their coverage area.

The report also recommends increased use of translators to broaden the coverage of UHF stations (p. 90).

81. We have already taken a step in this direction in the report and order in docket No. 15858, issued on July 9, 1965, amending the rules to permit 100-w VHF translators on any channel listed in the Table of Assignments unoccupied by a regular television station or satellite. The rules were also amended to permit 100-w UHF translators on all unoccupied UHF channels in the Table of Assignments in lieu of the previous limitation to the upper 14 channels. In addition, we have recently proposed to permit the use of microwave frequencies to relay programs to translators (notice of proposed rulemaking in docket No. 16424, FCC 66–41).

82. In line with this policy, we think that CATV systems should, upon request, carry the signals of commercial and educational translators operating in the community of the system with 100-w or higher power, where the system has the channel capacity to do so. Since noncarriage may effectively block the translator from access to CATV subscribers (par. 51 of the first report), the inability to reach the central core of the community may well destroy the incentive to establish

translator service for nonsubscribers in the community and persons in the surrounding areas. Moreover, we think that same-day nonduplication should also be afforded to translators carried on the system. Translators operating with 100 w or higher power are properly distinguishable from other translators since they have greater potential for development into stations, and it is particularly important that such development not be impeded by CATV operations.

83. Accordingly, we shall add a fourth priority to the three already listed in the carriage provisions of the rules. Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power. As requested in the comments, exceptions will be added to exempt CATVs from the translator carriage requirement where: (1) The CATV system is carrying the originating station, or (2) the CATV system is within the grade B contour of a station carried on the system whose programing is substantially duplicated by the translator. The provisions of the program exclusivity sections will also be appropriately amended to require same-day nonduplication upon request of a translator station carried on the system.

84. With respect to the second question, whether translators should be required to refrain from duplicating local stations, our present policies and rules are as follows: Pending the outcome of this proceeding, we have been following a policy of conditioning UHF and VHF translator grants with the requirement that the translator, upon request of any station within whose grade A contour the translator operates, refrain from duplicating the station's programs either simultaneously or within 15 days. (*Lee Co. TV Inc.*, FCC 65–483, 5 Pike & Fischer, R.R. 2d 257; *Report and Order in Docket No. 15858*, par. 12.) Under section 74.732(e)(1) of the rules, the only station-owned VHF translators authorized outside the grade B contour of the parent station are high-power (100-w) VHF translators operating on assignments in the Table of Assignments. Moreover, section 74.732 (e)(2) of the rules provides that a station-owned VHF translator which is intended to provide reception within the grade A contour of another station will not be authorized if there is any duplication, unless the translator is intended to improve reception within the principal city contour of the parent station. However, we have waived the provisions of section 74.732(e) (1) and (2) where a nonduplication condition was imposed.

85. Our translator rules and policies are currently in a state of flux. Part II of this proceeding (notice, pars. 61, 64) proposes a reexamination of all of our rules and policies relating to auxiliary services to see if they are holding back or encouraging a variety of off-the-air services. A number of measures were proposed in the comments in docket No. 14848, which were deemed beyond the scope of that proceeding but may be pertinent to this reexamination. It was suggested that the multiple ownership and duopoly rules be amended to allow potential 100-w translator operators to convert these to regular stations and to encourage television station licensees to apply for them. Other suggestions included proposals for increased power for existing translators on other channels; removing the restriction in section 74.732

(e)(1) on the use of VHF translators by television station licensees beyond their grade B contour; permitting translators to be used as relay stations (only) where the need exists; permitting multiple RF amplifiers for UHF as well as VHF translators; and permitting UHF stations to use VHF translators within their grade B contours. Moreover, AMST has recently filed a petition for a comprehensive, affirmative translator program which is being considered as a counterproposal in docket No. 14229, and will also be considered in our resolution of basic translator policies in part II of this proceeding.

86. We are not in a position to resolve these questions now. Moreover, we still lack sufficient information to determine the extent to which the rebroadcast consent provisions of section 325(a) may in practice limit duplication by translators.[43] In addition, if translators were required by rule to refrain from duplication within the grade B contours of regular stations, a question would be presented as to whether the provisions of section 74.732(e) (1) and (2) continue to serve a useful purpose or should be amended. It would be contrary to the public interest to delay a resolution of other portions of part I of this proceeding pending a thorough reexamination of the translator rules and policies. Nor does it appear advisable to undertake a partial revision of the translator rules at this point merely in order to attempt to equalize the position of translators and CATVs. In the circumstances, we think it best to defer rulemaking action until more basic translator policies have been established.

86a. In the meantime, we will continue to grant waivers of section 74.732(e) (1) and (2) in appropriate instances, and will condition station-owned VHF translator grants with a requirement of same-day nonduplication within the grade A contour. In view of our policy of encouraging UHF, we will not impose any nonduplication condition on UHF translator grants for facilities to operate in an all-VHF area. Nor do we believe it appropriate to follow any general policy of requiring a nonduplication condition where the translator applicant is not a broadcast licensee, e.g., a community sponsored translator. It would appear unlikely that such a condition is needed in, or would serve, the public interest. The rebroadcast provisions of section 325(a) may work with greater efficacy in the case of translators not owned by broadcast licensees. Further, the amount of duplication in this type of situation is not likely to be of a substantial nature, since local residents are clearly not apt to undertake the expense and inconvenience of translator operations supported by local assessments or donations unless a substantially different program service is being made available. In these circumstances, we do not think it desirable as a general policy to place any significant barrier,

[43] Although the notice requested information on the extent to which networks and other program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators, no party except National Broadcasting Co. commented on this subject. NBC states that since 1960 it has followed a general policy of granting consent for rebroadcast of its programs provided that the translator is closer to its originating station than to any other NBC affiliate. In a few recent instances, NBC has given rebroadcast consent where the translator operated in an area served by an NBC affiliate, but only for NBC programs which were not broadcast by the local station. See also par. 53 of the first report and order; *National Broadcasting Co.*, 20 Pike & Fischer, R.R. 1013; *Millers River Translators, Inc.*, FCC 63–504, 25 R.R. 516, 518, affirmed in *Springfield Television Broadcasting Corp.* v. *F.C.C.*, 328 F. 2d 186 (C.A.D.C.).

not urgently needed, to the development of such community type translators. We shall, of course, consider whether additional requirements are appropriate, either upon request or on our own evaluation of a particular situation, and will make all translator grants subject to the outcome of part II of this proceeding. We will also take into account, where warranted in individual situations, the possible discriminatory effect of our interim translator policy upon any existing CATV system competing with the translator.

4. Educational television stations

87. The rules adopted in dockets Nos. 14895 and 15233 require the carriage of noncommercial educational stations (ETV), but do not require CATVs to refrain from duplicating their programs. We followed this course because those proceedings were primarily concerned with commercial stations and many of the considerations discussed in the first report and order did not appear to be applicable to ETV. The notice herein recognized, however, that carriage alone might not be sufficient to promote the sound growth of local educational stations. Information was requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

88. Other than educational interests, most of those commenting on this subject were against extending any nonduplication protection to ETV, for the asserted reason that the widest possible dissemination of educational material is in the public interest. It is further asserted that CATV competition has no economic impact on ETV because it operates on a nonprofit basis. National Educational Television (NET), the National Association of Educational Broadcasters (NAEB), and Eastern Educational Network (EEN) take a sharply different view in their more extensive comments. They claim that local educational stations, though different from commercial stations, have an even greater need for nonduplication and interim protection because CATV undermines the local financial support and other local interest which is vital to ETV operations. In this they are supported by American Broadcasting Co., AMST, and labor unions representing employees in the broadcast, CATV, and associated talent industries.

89. EEN and NAEB stress the importance of local financial support to educational stations. Although Federal grants-in-aid under Public Law 87–477 are available for the construction of educational facilities, the operations of such stations are almost entirely dependent upon local financial support. Operating income is derived primarily from (*a*) schools and universities, (*b*) local and State governments, and (*c*) contributions and "subscriptions" from the general public and donations by local industries and businesses. Members of the public and local businesses will have little or no incentive to support the local station if ETV is made available on the cable by CATV's importation of outside educational stations. As EEN puts it (comments, p. 12); "It is wholly unrealistic to expect that the public will be willing to pay twice for educational service—to subscribe to CATV *and* to 'subscribe' to local ETV." Diversion of funds provided by local and area educational institutions and local and State governments for inschool television would be even more serious, since these

sources generally provide over one-half of the financial support for local educational stations.[44] If a distant ETV signal is available on the cable, and can be fitted into local schedules of instruction, local schools and local and State governments would be much more unlikely to provide the financial support and other interest necessary to start a local educational broadcast service. This would be particularly the case where the CATV offers to wire the urban schools "free." Unlike the local educational station, the CATV is in a position to make such an offer because it does not pay for programs or maintain expensive facilities for local program origination and it can recoup the cost of free school service through subscription fees charged to the general public.

90. Should CATV activity within urbanized areas siphon off sufficient local financial support to preclude the establishment of a local ETV station, the loss would be keenly felt by the public. The existence and viability of local educational broadcast outlets has special significance for ETV because the educational process is geared to local conditions and needs. Local ETV stations are more than mere facilities for delivering educational programs. They are an integral part of the educational and cultural life of a community and area. This is particularly true where ETV is used for inschool instruction. ETV must plan, prepare, and schedule educational programing on the basis of individual school and community needs, whether the basic program material is produced by the station itself or outside sources. The station also provides study guides for use by the teachers in the schools. CATV cannot effectively provide this carefully planned and prepared service by indiscriminately importing signals from distant educational stations located in cities with different needs and interests.

91. Moreover, local educational stations serve not only the schools and populations in the immediate community; they provide service to the surrounding rural area not reached by CATV. NAEB points out (comments, p. 2):

> Indeed, it is the rural area with limited budgets, facilities, and pupil concentration which has the most pressing need for the teaching resources of educational television. The specialized language, art, music, or science teacher who cannot be supported by a rural school system can, nevertheless, be enjoyed through the pooled resources of educational television.

In this connection we note also comments filed by the American Farm Bureau Federation, National Farmers Union, and National Grange stating that rural residents, who often are relatively remote from the entertainment attractions of the city, probably more than other groups of citizens in the country, rely especially on radio and television as a major source of entertainment and information.[45]

92. Accordingly, the educational interests urge that ETV stations be granted nonduplication protection for a period either the same as

---

[44] "The Financing of Educational Television Stations," report of a study conducted by Educational Television Stations, a division of the National Association of Educational Broadcasters, p. 19 (1965).

[45] Apart from ETV, it is stated that rural residents rely especially on local broadcasts giving agricultural information, weather conditions (flood, frost, etc.), pest hazards, and current market conditions.

or much longer than that accorded to commercial stations.[46] Moreover, both NAEB and EEN urge the adoption of procedures to protect communities with educational reservations which have not yet been activated. NAEB requests that the CATV be required to notify local and area school authorities and ETV interests of its proposal to bring in a distant ETV signal. In this way, NAEB states, local ETV interests would be alerted and could bring the matter to the Commission's attention for whatever action or conditions appeared warranted in the circumstances. EEN urges the adoption of interim procedures similar to those proposed for CATV operations in major markets in paragraphs 49 and 50 of the notice.

93. The considerations put forth by the ETV interests are not answered by simply stating that the public interest is served by the widest dissemination of educational material. If CATV operations should prejudice the establishment of new ETV stations on the unused reserved assignments or prevent existing stations from realizing their full potential, the result would be a narrowing of the distribution of educational material—a loss hitting hardest persons residing in rural areas and those unable to afford CATV fees. As in the case of commercial stations, CATV's proper role is to supplement, rather than to supplant, local educational broadcast service. The national policy of encouraging the full development and expansion of ETV is reflected in the grants-in-aid legislation (Public Law 87–477) and has long been a matter of deep concern to the Commission (sixth report and order, pars. 33–49). It would be plainly inconsistent with that policy to accord educational stations less protection than commercial stations if there is any real likelihood of prejudice flowing from CATV importation of outside ETV signals. Considering the continuous financial struggle of ETV and its dependence upon local financial support and interest, we think that the possibility of adverse effect is sufficiently strong to warrant some special protection for ETV.

94. In view of our decision to adopt same-day nonduplication for commercial stations and since it is asserted that effective nonduplication protection for ETV would require a much longer period, we do not think it appropriate to adopt 15-day before-and-after nonduplication for ETV, as requested by NAEB and ABC. There is no agreement among the educational interests as to what time period would be appropriate, and even an extensive nonduplication period would not solve the problem of achieving adequate operational funds for existing ETV stations. We believe that more effective relief to ETV can be provided by the approach discussed in the succeeding paragraph, than by delayed nonduplication periods such as 15 days before and after. Therefore, while recognizing that some measure other than nonduplication may be more suitable for ETV, we shall amend the exclusivity provisions to include educational stations. The rules will thus apply equally to all stations in line with our conclusion (par. 54 above) that they should be the same for all systems. We will, of course, be alert to guard against the possibility that CATV may pose a more acute problem for ETV than presently appears, and

[46] The longer period is sought because of the block distribution process for the NET scheduled service and distribution patterns of regional educational networks like EEN.

would not hesitate to amend the rules should this subsequently prove necessary. ETV interests have indicated their intention to keep us apprised of any worsening developments and are encouraged to do so.

95. Perhaps the most troublesome problem raised by the ETV comments is the possibility that CATV, by bringing outside educational signals into communities where educational assignments have not yet been activated, will siphon off enough local support to preclude the establishment of an educational station. The policy of reserving channels for educational stations is in recognition of the fact that some time may elapse before such stations come into being. While the grants-in-aid legislation has speeded up the process in many areas,[47] the reservations still serve a needed purpose which should not be undercut. CATV provides a valuable service to schools and other subscribers by bringing in ETV which is not yet locally available. But this should not be at the expense of preventing a local service from ever being established. Accordingly, we shall adopt the suggestion of NAEB that local and area ETV interests and school authorities receive advance notice of CATV proposals to bring in outside ETV signals. The attached rules (app. D) require the CATV system to give notice of its proposal to bring in a distant ETV signal, at least 30 days prior to commencing service, to the local superintendents of schools and to the area and State educational television agencies (if any). This will enable ETV interests in the area to make objection to the CATV system where a local station is contemplated. Where a local ETV station is reasonably imminent and objection is made to the Commission, we would not ordinarily approve importation of the distant ETV signal unless it has been established after appropriate proceedings that this would not prejudice the establishment or maintenance of a local ETV service.

96. And, finally, it is asserted by NET and NAEB that, where an educational signal is carried on a CATV on a channel partially used for commercial signals, the placement of commercial announcements adjacent to educational material carried on CATV jeopardizes the public image of ETV and prejudices its position with program suppliers and copyright owners who insist upon noncommercial presentation. However, we do not think that a sufficient basis has been shown for the relief requested, i.e., prohibiting commercial announcements adjacent to educational programing or requiring CATVs to devote channels exclusively to educational programing. We cannot undertake to preserve ETV or commercial stations harmless from all conceivable prejudice no matter how slight. Moreover, we are reluctant to interfere with CATV operations any more than necessary in the public interest or to impose requirements not shown to be essential. CATV systems with limited channel capacity and those carrying a large number of commercial signals might find it difficult to devote channels exclusively to ETV. CATVs may also wish to use educational signals to fill in portions of commercial signals which cannot be carried because of the nonduplication requirements. Moreover,

[47] The number of educational TV applicants in UHF (where most of the unused educational reservations are) has increased from 5 at the beginning of 1962 to 30 as of the end of 1965; during this period 34 more UHF educational stations went on the air.

since educational stations normally do not have as long a broadcast day as commercial stations, the CATV system may wish to provide its subscribers with other material during the time that the educational station is not broadcasting. In view of the station identification announcements made during the course of the educational programing, it seems to us that the prejudice to the originating ETV station, if any, would be minimal.

D. Procedural Matters

1. Ad hoc procedures

97. It has been suggested in the comments that the Commission should adopt specific rules providing for summary, nonhearing procedures to handle requests for waiver of the CATV rules or for different treatment or affirmative relief. We think the suggestion has merit. The general provision for waiver of any rule (sec. 1.3 of the rules) does not afford an adequate procedure for seeking additional affirmative relief or different treatment. Moreover, such procedures would be useful to handle requests for rulings on complaints or disputes. We recognize that to hold hearings upon each such request relating to carriage, nonduplication, and ETV, would be time consuming and burdensome to the CATV systems and stations involved, particularly those in smaller communities. In addition, while such procedures will not apply to the matter of distant signals in the top 100 markets, for which a showing made in evidentiary hearing is required (see par. 141 below), they could be utilized in many instances to resolve distant-signal questions in the smaller markets.

98. Accordingly, we have undertaken in section 74.1109 of the attached rules to devise flexible and fair procedures which will generally permit expeditious processing of such requests. The procedures require a written petition with notice to interested persons and afford an opportunity for submission of comments or opposition to any request and for reply. Upon good cause shown, the Commission may shorten the times specified in the rules for the filing of opposition or reply comments. The petition and all other pleadings filed by the petitioner or interested persons must contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon. In the case of complaints or disputes, the steps taken by the parties to resolve their problem must also be set forth. The Commission will, where possible, promptly dispose of the matter on the basis of such written submissions. However, additional procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, may be specified by the Commission if they appear necessary or appropriate after consideration of the pleadings.[48] In the event that the petition involves new service to CATV subscribers, the Commission will expeditiously rule on the matter, either in whole or to the extent of determining whether there

[48] Since petitions under the ad hoc procedures may involve the resolution of controversial issues which in basic fairness should be determined on the pleadings of the parties, we shall amend the ex parte rules to make them applicable to proceedings under sec. 74.1109, as well as to proceedings under sec. 74.1107. The principles discussed in par. 9 of the report and order in docket No: 15381, FCC 65–598, 1 F.C.C. 2d 49, will also apply.

should be a stay or other temporary relief pending such additional procedures as may be required (see par. 100 below).

2. Information to be filed with the Commission by existing CATV systems; notification by new CATV operations

99. Pursuant to our authority under section 403 of the Communications Act, all existing CATV operators will be required to submit to the Commission, within 30 days after the effective date of our order herein, the following information with respect to each of their CATV systems: (*a*) The names, addresses, and business interests of all officers, directors, and persons having substantial legal or beneficial ownership interests in each system;[49] (*b*) the number of subscribers to each system both currently and as of February 15, 1966; (*c*) the television stations carried on each system; and (*d*) the extent of any existing or proposed program origination by each CATV system. Any CATV system which is located within the predicted grade A contour of a television station in the top 100 television markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) and which carries the signal of a distant station(s) will also be required to submit a map showing the location of its cable lines being used to serve subscribers on February 15, 1966.[50] It is not practicable to apply the notification provisions set forth below to the present operations of existing systems, and there is no comprehensive or accurate listing of CATV systems available to apprise television station licensees or permittees of all existing CATV operations within their grade B contours. Indeed, we have noted that while the recent growth of CATV is of an impressive nature, there are conflicting estimates as to the precise dimensions of that very substantial growth. The information obtained will assist the Congress in its consideration of the Commission's legislative proposals in the CATV field, and the Commission in its consideration of matters in part II of the notice and petitions described in paragraph 149 below.

100. New CATV systems will be required to notify the licensee or permittee of any television broadcast station within whose predicted grade B contour the system will operate and the licensee or permittee of any 100 w of higher power translator located in the community of the system, with a copy to the Commission, concerning the proposed operation within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities. In no event may new service be commenced until 30 days after notice has been given. The notice shall include the name and address of the system, identification of the community to be served, the television stations to be distributed, and the estimated time for the commencement of operations. Similar notification will be required by existing systems which propose to add new distant signals (at least 30 days prior to commencing service) or to extend lines into obviously new geographic areas (within 60 days after obtaining a franchise or entering into a lease or other arrange-

[49] In stating the ownership interests in a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

[50] Existing systems in the markets below 100 may subsequently be required to submit a map showing the location of lines as of a specific date in connection with any petition for ad hoc consideration of a geographic extension into new areas.

ment to use facilities or at least 30 days prior to commencing service where no new local authorization or contractual arrangement is required). In addition, as already indicated, notice to local and area educational authorities and ETV interests will be required at least 30 days prior to commencing service where carriage of a distant ETV signal is proposed. Such notification will afford the local television stations and other interested persons an opportunity to request carriage and nonduplication under the rules or to petition the Commission for different requirements before service is commenced and thus avoid disruption to the public. Where a petition for ad hoc consideration is filed with the Commission by any station, CATV system, or other interested person within 30 days after notice, new systems and existing systems proposing to add new distant signals shall not commence new service until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.[51] In the event that an evidentiary hearing is required, the question of whether there should be a stay or other temporary relief pending the hearing will be expeditiously resolved prior to the hearing on the basis of the pleadings of the parties and such additional written submissions as the Commission may request.

3. Form and enforcement of the new rules

101. Aside from the obvious distinction that nonmicrowave CATVs do not file applications for licenses with the Commission or use licensed facilities, no special problems of substance or procedure in making the carriage and nonduplication requirements applicable to them have been called to our attention and none is apparent to us. While the substantive requirements will therefore be the same for all systems, some differences in form or procedure are necessary in the case of the nonmicrowave CATVs. First, the obligations will be imposed directly on the CATV system itself, rather than taking the form of conditions on microwave authorizations. Second, enforcement will be through the cease and desist procedures set forth in section 312 (b) and (c), or pursuant to section 502, of the act and will not include other sanctions applicable to licensees. And, third, some change is required in the provisions requiring notification to all licensees or permittees of television stations placing a grade B or better signal over the community of the CATV system that a microwave application has been filed or a request has been made of a common carrier for microwave service. (See sec. 2 above.)

4. Retention of the microwave rules

102. It is urged by American Telephone & Telegraph Co. and by U.S. Independent Telephone Association (both in comments in docket No. 15971 and in its petition for reconsideration of dockets Nos 14895 and 15233) that the rules governing microwave grants should be deleted when the obligations are imposed on CATV systems directly. We think it best to retain the rules conditioning microwave grants (as revised herein) in their present form for a while longer, until CATVs

[51] The matter of extension of lines into new geographical areas by existing systems in top 100 markets is discussed in par. 149 below. As already indicated, the ad hoc procedures do not apply to new service involving distant signals in the top 100 markets or obviate the need for evidentiary hearing as set forth in pars. 141–143 below.

generally are operating in accordance with the new rules. Pending such compliance, we cannot make the requisite public interest finding for the issuance of the microwave licensee in the absence of a showing that the facilities will be used in accordance with the conditions. Moreover, the requests of A.T. & T. and USITA are primarily grounded in the alleged burden to the common carriers, which will be substantially alleviated in this interim period by the revisions made in the memorandum opinion and order on reconsideration in dockets Nos. 14895 and 15233, 1 F.C.C. 2d 524. However, once widespread CATV compliance with the new rules has been achieved, some modification of the microwave rules would clearly appear to be appropriate and we shall take action toward this end as soon as it is possible to do so.

5. Transition period

103. In the first report and order (par. 161) and in the notice (par. 34), we stated that we would consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and nonmicrowave systems with limited channel capacity. To obtain relevant information, the Commission mailed a questionnaire to every known CATV operator. The questions were designed to elicit specific information with respect to the effective channel capacity of each system, the local television signals which might fall within the carriage provisions of the rules, and the number of channels in use for nonlocal television signals or other purposes. Responses were received from 1031 CATVs, of which 250 were microwave-served and 781 were nonmicrowave.

104. Upon analysis of the responses, it appeared that less than 20 percent of the microwave systems were not in compliance with the carriage provisions, and half of these either had the unused channel capacity to come into compliance, or, in view of plans to expand the system, would shortly be able to comply. Less than 10 percent of the microwave systems could not comply with the rules without having to drop one or more signals currently carried. Accordingly, the Commission, on December 8, 1965, determined that there was no need to afford microwave-served systems a general delay in the application of the rules relating to carriage, and notified all common carrier and Business Radio Service licensees serving CATVs that the rules would be effective on and after February 1, 1966, to renewal applications. We further advised such licensees that the renewal application should contain a request for waiver of the rules relating to carriage, if a waiver were desired, together with the following showing:

> The request for waiver should include the petition by the CATV system that the microwave licensee seek the waiver from the Commission; and the system should include a statement that it has served a copy of that petition on any television station to be affected. The request for waiver should demonstrate the hardship to the CATV system, the disruption of service to the customers of the CATV system which would result from immediate compliance with the carriage requirements, the need for the particular length of time for which the waiver is requested, and the future plans to come into compliance. Finally, the request should state whether substitution of the local station's signal on a simultaneous-only basis will be afforded during the period for which any waiver is granted where the local station is not now carried and its programing is duplicated by a more distant signal. See *Black Hills Video Corp.*, 6 Pike & Fischer, R.R. 2d 199, at 201 (par. 9).

105. With respect to the 781 nonmicrowave systems who responded to the questionnaire, it appears that 605 are already in compliance with the carriage requirements of the rules. An additional 87 systems have sufficient unused channel capacity, or are expanding their capacity, and would be able to comply without having to drop any presently carried television signal. Two systems might have to utilize a channel presently carrying FM radio and CATV originated programing, and 10 systems furnished insufficient information for any conclusion as to their situation. There remain 77 systems which would have to drop one or more television signals presently carried in order to add one or more television signals required to be carried by the rules.

106. Thus, as in the case of microwave systems, it appears that only a comparatively small percentage of the nonmicrowave systems could not comply with the carriage provisions without substituting a local for a more distant signal. In the circumstances, we believe that there is no need to provide for a general transition period by rule. The problems of individual systems will be considered on a case-by-case basis, upon a request for waiver making the same showing applicable to microwave systems. Accordingly, the rules will apply immediately to all new CATV systems commencing operations on or after their effective date, and will apply 60 days thereafter to existing systems unless a request for waiver has been filed with the Commission. Our aim is to allow an orderly transition period for the relatively small number of systems with limited channel capacity whose viability might be jeopardized by immediate application of the rules, or where existing service to CATV subscribers would be unduly disrupted (as against the *Black Hills* type of protection (6 R.R. 2d 199, at 201 (par. 9)) during the appropriate transition period).

107. The foregoing discussion of the apparent situation with respect to carriage does not take account of 100-w translators operating in the community of the CATV. Our decision (pars. 82, 83 above) to accord high-power translators fourth priority may raise some additional channel capacity problems. While this new provision will have the same effective date, waivers may be sought by microwave and nonmicrowave systems either within the 60-day period or upon receipt of any request for translator carriage which gives rise to some problem.

6. Copyright suits

108. Finally, we shall make brief mention of the copyright matter because, despite our plain statements in paragraph 159 of the first report, there would still appear to be some confusion on the part of some persons as to the effect of our carriage and nonduplication rules upon the pending copyright disputes. We have stated that our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. Thus, the fact that we have given the local station the right to have its signal carried over the CATV system (and not duplicated for a reasonable period), affords no defense to that system in a copyright suit. The station cannot

bestow broadcast or transmission rights to programing which it does not own (or as to which it has not obtained a license to do so). See *Report on Rebroadcasting Rules*, 1 (pt. 3) Pike & Fischer, R.R. 91: 1133, 1134, 1137, where we stated in connection with rebroadcast rights under section 325(a), that the section "may no longer accurately reflect present conditions" since most programs were not owned by the originating station who could not therefore legally grant the rebroadcast permission sought. In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the first report, have to revise our rules.[51a] We have acted now, in light of the present copyright situation, which would appear likely to obtain for some substantial period of time, and without the slightest intent of affecting the determinations to be made in the pending suits.

CONCLUSION AS TO PART I

109. The foregoing are the rules which we believe to be appropriate for all CATV systems at this time. We believe that they represent a fair balancing of the competing interests, and properly accommodate both industries and thus, the public interest "in the larger and more effective use of radio" (sec. 303(g)). We recognize further revision may be called for as we gain experience in their implementation. This docket (15971) remains open with this report designated as the second report, and we shall revise the rules, as the public interest requires, in our consideration of part II or upon the basis of new information or experience (and, if appropriate, after giving notice of such proposed revisions). Finally, as in the case of all rules, we shall give further guidance through the medium of rulings directed to specific situations.

110. In light of the foregoing, we find that the public interest would be served by modification of the rules previously promulgated for microwave-served CATV systems and the adoption of rules governing all CATV systems, as set forth in the attached appendix D. Authority for the rules adopted herein is contained in sections 1, 2(a), 3(a), 4 (i) and (j), 303, 307(b), 308, 309, 310, 319, and 403 of the Communications Act of 1934, as amended.

PART II. MAJOR MARKET, DISTANT STATIONS POLICY—PARAGRAPH 49–50 OF THE NOTICE

A. The Notice; Comments

111. In the notice, we stated (par. 49, 1 FCC 2d at p. 471):

> * * * pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the area. A like showing must be made in applications for microwave facilities to serve a

[51a] And, of course, stations will have to take into account the effect of any copyright decision in making requests for carriage under the present rules.

> CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the grade B contour of such three or more commercial stations), any new UHF television station would be independent in operation.

In paragraph 50, we specifically invited comment:

> * * * on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its grade B contour into a community with the situation described above (par. 49)), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community.

112. We have considered the comments received on this important aspect. A summary of some of the comments is set out in appendix B.

B. Evaluation

113. The discussion in appendix B gives some of the highlights of the comments submitted on this aspect. The more detailed showings have, however, been considered, and will be referred to in the ensuing discussion. While these showings are pertinent, particularly with respect to the trends which are so important to our evaluation, they do not supply definitive answers to the problems before us; rather, they serve to point up the problems and, in the circumstances, to the procedures called for. We shall develop the underlying considerations at some length, and even with some repetition of the discussion in part I, because of the great importance of the matter. There are two central grounds for our action—(1) an economic impact ground, based on the trends in the CATV and UHF fields; and (2) a fair competition ground, based on the patently anomalous conditions under which the broadcasting and the CATV industries compete.

1. The economic impact ground

114. *The UHF trend.*—As stated in our notice, we are at a watershed in the development of UHF broadcasting. UHF broadcasting generally suffered a very serious setback in the 1950's and limped along until the passage of the all-channel receiver legislation. In enacting this "unique" legislation in 1962, Congress made the judgment that development of UHF "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States" (H. Rept. No. 1559, 87th Cong., 2d sess., p. 4; S. Rept. No. 1526, 87th Cong., 2d sess., p. 7). Such a system would "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression," provide "at least three competitive facilities in all medium-sized communities," and make provision "for at least four commercial stations in all large centers of population" (H. Rept. at p. 3). Such a fourth station might make possible a fourth national network or the formation of "FM-type networks" in television, and also would be "valuable particularly for local programing and self-expression"—an important need in many markets "because all of the available stations are network affiliates" (H.

Rept. at p. 3; S. Rept. at p. 4). Thus, as shown by the above and the compulsory sale of all-channel sets at the rate of over 9 million a year, Congress and the American public have staked a great deal on the development of UHF.

115. As we pointed out in the notice and our prior discussion, there is every present indication that the all-channel set requirement is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for the larger cities. Thus, from the beginning of 1962 to the end of 1965, the number of UHF commercial stations on the air increased from 85 to 100, and most significant as an indication of the trend, the number of applications pending (with multiple applications for the same channel counted once) increased from 19 to 80. There are now indications of the beginning of a fourth network or of an "FM-type" network, involving UHF and VHF stations in some major markets. With this increased ferment in UHF, we believe that the next few years will supply the critical answer to whether the congressional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved. (See H. Rept. at p. 7; S. Rept. at p. 6.)

116. *The CATV trend.*—The CATV trend is even more pronounced, and has already been noted in our first report, paragraph 65, 38 F.C.C. at page 709, and in the prior discussion (pars. 31–33). As stated, the CATV growth has been explosive and gives every indication of continuing its phenomenal spurt. In 1959, there were about 550 CATV systems, in 1965 at the time of the first report, there were about 1,300 CATV systems, and today—less than a year later—it is estimated that there are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, there are 1,026 CATV franchises which have been recently granted but are not yet operating (ibid.). The number of applications for franchises is even larger—an estimated 1,958.[52] Clearly, there is considerable substance to the statement of the official of one of the largest CATV groups, quoted in our notice (par. 39, 1 FCC 2d at p. 468):

> The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day * * *.

117. Equally important is the changing nature of the CATV operation. In 1959, the average CATV provided three signals to its subscribers; in 1965 the majority provided five or more signals (par. 65, first report), and the average system built today has 12-channel capacity.[53] There are now 20-channel systems proposed (e.g., the Jerrold proposal in Philadelphia), with industry leaders predicting

[52] As noted, the estimates as to franchises granted and applications vary. See pars. 31, 116, supra. NCTA reported recently that 1,500 applications for CATV permits had been filed in the last 12 months and that 1,200 were pending (N.Y. Times, Dec. 19, 1965). By any estimate (e.g., TV Digest, AMST, NCTA), the figures are impressively large.

[53] In its reply comments (p. 18), AMST asserts that of 54 systems for which data was available and which began operations in 1965 (through July of 1965), only 5 were 5-channel systems; 44, or 81.5 percent were of 12-channel-capacity.

236-331 O—66——7

that in the next 5 years "improved technology will have made the 20-channel CATVs commonplace * * *" (Television Magazine, Dec. 1965, p. 31). There is greatly increased use of microwave facilities (i.e., from 50 systems using microwave in 1959 to 250 in early 1965 to about 450 today). The distance which signals are taken has also increased greatly (to over 665 miles). Finally, the CATV industry has shifted its attention to the larger communities, and CATV franchises have been granted or are being sought in such cities as Philadelphia, Toledo, Cleveland, San Diego, Dayton, Baltimore, Syracuse, Albany, Sacramento, Pittsburgh, Birmingham and Fort Wayne. To quote again the large CATV group (par. 39 of the notice):

> First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.
>
> But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut, and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester Counties, Pa., etc. * * *.

The CATV applicant believes that it can be successful in such cities because it will bring better reception (particularly as to color) and, most important, the programing of important independents (e.g., the three New York independents to Philadelphia).

118. It is apparent that these two trends (UHF and CATV) raise a serious question. Both CATV and UHF broadcasting, for example, are entering the larger markets, most often in an effort to bring programing that is not now available in these markets. There are at least 163 communities or areas with UHF stations operating, authorized, or applied for which also have CATV activity. In 68 such communities or areas, there are already operating CATV systems; 29 have CATV systems franchised but not operating, and 66 have CATV applications pending. In the notice, we set out as an example the Philadelphia area, where there are now three commercial UHF stations on the air (and another one authorized) and there are several well-financed CATV applicants seeking to bring in the signals of the three New York independents. The most critical question posed is how these two trends mesh in the ensuing years.

119. We have studied the comments carefully in this respect. While they give some indications (see par. 122, infra), the answer remains uncertain. On the one hand, the NCTA, relying largely on the Seiden report, contends that CATV in a large community such as Philadelphia can have little effect on the healthy existence of UHF stations; that if anything, CATV will aid these stations by bringing them into homes where they might not otherwise be received. But we believe that this contention has significant defects.[54] In any event, it would appear

[54] The Seiden report assumed "an optimum" of 50 percent penetration of the Philadelphia market by the CATV (but see para. 122–123 as to the "optimum" CATV penetration), and then, based on the fact that the three New York independent stations account for 9 percent of the TV homes during prime time, arrived at the conclusion that there would be a diversion from the Philadelphia UHF stations due to CATV of only 61,450 homes but of 1.3 million TV homes in Metropolitan Philadelphia (report, pp. 84–86). As already noted (n. 19, notice) the report measures the diversion as against the total Philadelphia

that a crucial consideration is whether the Seiden report is correct in its belief that in the large cities, it "is not clear as to what these CATV promoters will offer that makes them think that they gain substantial numbers of subscribers in such areas" (Seiden report, p. 84). In his judgment, "potential CATV markets are those areas lying 40 or more miles distance from three full network signals * * *" (id. at p. 83).

120. But very important segments of the CATV industry do not agree with the Seiden report. They are proposing to invest very large sums of money (including amounts such as $40 million) in their belief that CATV, employing 12, 20, or even greater capacity systems, can gain very substantial audiences in these large markets. The leaders of such important CATV groups as Jerrold or Teleprompter believe that "almost all American cities—small and large—will be wired for television * * *" and, in the words of the top official of Teleprompter, "within the next decade, 85 percent of all television sets in the United States may be receiving their programs by cable rather than over the air" (Television Magazine, Dec. 1965, p. 30). Another experienced CATV operator estimated more conservatively that CATV may reach 30 to 35 million households within the next decade (Broadcasting Magazine, July 26, 1965, p. 31).

121. We do not accept the above statements as necessarily correct, any more than we accept Dr. Seiden's assertion to the contrary. The plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets.[55]

122. Indications in the materials before us would appear to indicate substantial growth and substantial impact by CATV in the large

---

audience, plainly ignoring the very facts upon which the analysis is based. The point is that whatever criterion is used to measure CATV impact, the same criterion should be used to measure the audience UHF would have without CATV. If, therefore, it is assumed that 9 percent of the CATV subscriber homes would, on the average, be watching the three New York independent stations and would therefore be diverted from the three Philadelphia UHF stations, the resultant figure—61,450 homes—should be related not to the 1.3 million TV homes in Metropolitan Philadelphia, but rather to the average number of homes in Metropolitan Philadelphia that would be viewing the three UHF stations if there were no CATV. The audience for nonnetwork programing in Philadelphia is certainly no greater than in New York (and indeed would undoubtedly be much smaller in the beginning). If, therefore, 9 percent of the TV homes during prime time were assumed to be the number which, on the average, would be watching the three Philadelphia UHF stations, this would result in a total average audience of less than 120,000 homes against which the impact of a loss of more than 60,000 homes should be measured rather than against 1.3 million TV homes. In short, the Philadelphia audience which would be attracted to the New York independent stations is a very important part of the audience at which any independent Philadelphia UHF station must aim—a critical point ignored by the Seiden report.

We would also point out several other factors: (i) The potential effect on the UHF independent becomes even more serious when markets smaller than Philadelphia are considered (see footnote 57); (ii) it is unrealistic to assume that UHF independents in such markets will have the financial base to bid for and obtain the same amount of expensive nonnetwork film program as the New York VHF independents, with their much larger population base, and thus, the CATV audience for nonnetwork programing may well not be divided equally between the UHF independents and the distant VHF ones; and (iii) the 20-channel system would permit the importation of the New York network stations which would also contribute to diversion of audience during the 30–45 percent of time these stations are presenting nonnetwork fare.

[55] As stated, the CBS study indicated that it had not included "* * * a group of application for CATV systems in communities with three more than adequate services [e.g., * * * applications for franchises * * * in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland * * *]. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have talked about thus far and, in fact, much of the country could ultimately become CATV territory." (CBS comments, exhibit A, pp. 16–17.) Thus, CBS focus was on the old or "traditional" CATV and not the new developing trend in the industry.

markets. Thus, Midwest Television, the licensee of a San Diego station, submitted a study made by an independent research organization in late June 1965, of the San Diego area, the 51st market (ARB ranking on net weekly circulation), with three VHF stations and CATV systems which carry these stations and all seven Los Angeles VHF stations without nonduplication treatment. The study indicated that the CATV systems, with a present total of roughly 10,000, are adding subscribers at a rapid rate. Thus, in one section where CATV had been available for only 3 months, more than 36 percent of the homes had already been wired for CATV; as of late June, 43 percent of the CATV subscribers interviewed had been subscribers for less than 3 months (Midwest comments, dockets Nos. 15971, 14895, and 15233, pp. 24, 28). But this study is obviously too fragmentary to be conclusive on this important question. The study also indicates very considerable impact upon the local stations. See paragraphs 40–41, supra.[56]

123. There is no doubt as to the seriousness of the question posed. The new UHF stations face a difficult road; we would expect, with the passage of time and thus the build-up of all-channel sets, and related endeavors, that these new operations would be successful. But if a CATV, with 12- or 20-channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50 percent or over), the UHF stations might face a very difficult hurdle. The audience for nonnetwork stations is limited (about a 10-percent share in most markets in the prime time) and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the nonnetwork programing would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of commonsense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive nonnetwork programing. Any gain in better reception of the UHF signals might be far outweighed by the splintering of the limited audience for independent programing. The UHF stations will in any event gain a very substantial audience in these markets, through the operation of the all-channel receiver law. While the CATV might bring them a little sooner or with somewhat better reception into some TV homes, it would appear to do so at the cost of fragmenting greatly the limited audience interested in viewing nonnetwork programing in the prime listening hours. See note 54, analyzing the Philadephia situation on the basis of a 50-percent CATV penetration.[57] As pointed out, the

[56] To the same effect, see the address of Mr. George Blechta of Nielsen at the July 1965 NCTA convention, where Mr. Blechta referred to an eastern television market "where the sample indicated that one-third of the viewers are CATV subscribers and that the local stations have a combined share of audience of 85 percent among non-CATV homes in contrast to a share of 'less than one-half' among CATV homes." (Sponsor Magazine, July 26, 1965, p. 14.)

[57] Further, Philadelphia is the fourth largest market in the country. But in smaller, even though still major, markets, similar analyses raise even more serious questions. Thus, in the Sacramento-Stockton market (the 27th in ARB ranking) having 300,400 TV homes in the metropolitan area, 63 percent or about 189,000 metropolitan area homes on the average are watching television in prime time; without CATV, the UHF would do well to get a prime-time audience of 15,000 homes. While this audience, on the basis of our experience, would normally appear sufficient to support operation, obviously, significant diversion of the audience by CATV could be a serious matter. Yet CATV systems could bring in the VHF independents from San Francisco and, as we understand, from Los Angeles also. This example, dealing with a major market, could be multiplied many times.

nonduplication provision would afford virtually no relief, since nonnetwork programing is not distributed on anything like a simultaneous nationwide basis.[58] The rise in advertising demand for television time is also pertinent to this question; as noted (footnote 30), there are countervailing considerations which, at the least, require that this fact be considered in the context of the particular situation (e.g., in Philadelphia there are three and possibly four new stations to share the increased advertiser demand). Finally, we point out that it is not just a matter of causing the demise of the independent UHF stations; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest "in the larger and more effective use of radio" (Communications Act, sec. 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50- to 85-percent figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting.

124. It has been urged that we simply ignore the problem and let events in the major markets decide between CATV and the UHF broadcast stations. But for reasons already developed, such a course would be inconsistent with our statutory responsibilities and might lead to results inconsistent with public interest in a number of respects:

(i) CATV does not now serve the rural areas, and it has not been established that it can practically do so. If CATV were to undermine the healthy development of UHF, it would mean that people in the urban or more built-up areas would be getting additional service at the expense of those in the rural areas; we think that such a result is patently inconsistent with the public interest and the Act's goals.

(ii) CATV is a form of pay-TV, in the sense that one must pay to obtain the television service. There are substantial numbers of people who either cannot afford to or do not wish to pay for television.[59] If then the CATV blocks development of UHF broadcasting, it would again mean that some people would be getting additional service at the expense of those who cannot afford or are unwilling to pay for such service.

(iii) Most important, CATV does not serve as an outlet for local self-expression. It does not present local discussions, the local ministers or educators, the local political candidates, etc. If events in the major markets should establish that CATV has prevented the healthy maintenance of UHF broadcasting, it would mean that, for example, New York independents would have been substituted for Philadelphia independents. We think that would be contrary to sound allocation principles, long established in section 307(b) of the act. It would be a clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia additional broadcast stations to meet the "important needs" for "local programing and self-expression" (par. 41, notice). It would also undermine the goal of a fourth national network built upon these additional stations (par. 41, notice).

---

[58] Nor would extension of the UHF station's signal beyond its grade B contour by CATV systems compensate for fragmentation within that contour by CATV systems having very substantial penetration. We note that CATV systems tend to bring in the distant big city independents (since such stations constitute a better sales point in obtaining subscribers) rather than the new UHF stations. In any event, an independent's source of revenue is the local and national spot business, as to which the metropolitan area rating plays a very significant role. As shown by the above discussion, that rating could be seriously affected in the event of very substantial CATV penetration.

[59] Thus, even the CATV industry estimates that on an industrywide basis CATV systems now in existence have achieved about 55 percent level of the total number of TV homes in the markets served, and that this figure will ultimately rise to 70 percent. (Television Magazine, Dec. 1965, p. 30).

125. If the New York independents sought translators to place their signals over the Philadelphia area, it could not seriously be argued that we should grant such applications on the ground that while they may be destructive of congressionally established goals, events in the market place should be allowed to give the answer. The matter is not really different here. The Commission has jurisdiction to "establish areas or zones to be served by any station" (303(h)), to make a "fair and equitable distribution of facilities among the several States and communities (sec. 307(b)), and "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions" (4(i)). If then we sit back, even though we have the jurisdiction, the authority, and the responsibility to carry out the congressional policies, and do not thoroughly explore the serious question posed, we would be simply abdicating our responsibility "to promote the larger and more effective use of radio in the public interest" (sec. 303(g)).

126. To summarize, we have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and more effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

127. We have focused in the above discussion on the independent UHF station. But as interested parties such as Storer have stated, there is also a problem with respect to the new UHF station in a market with two VHF stations. The UHF station does not necessarily obtain a full line of network programing in such markets; either initially or for a considerable period of time, it may be dependent to a very substantial extent on nonnetwork fare. Further, several parties have expressed the fear that because of CATV, such new UHF stations will not be able to obtain a primary network affiliation. Finally, we note that to a significant degree, whether rightly or wrongly, CATV penetration would appear to have a discouraging effect on entry of new UHF stations (or on the substantial expenditures which must be made for the high tower and power necessary for an effective operation). Permittees of several new stations have set out their fears of the consequence of CATV importation of distant stations from New York, Los Angeles, etc. To give but two examples:

(i) The permittee of the new UHF station in Sacramento has informed the Sacramento City Council that the importation of outside signals from San Francisco-Oakland and Los Angeles, as proposed, would make it impossible for the UHF station to survive (joint comments, p. 15).

(ii) [Regardless of whether Jerrold's proposed Jacksonville CATV system will be subject to carriage and nonduplication], it is your permittee's belief that should Jerrold introduce through its proposed system the programs of the three television networks, it will be impossible for WJKS-TV to obtain the network affiliation required for its survival. (Statement of Rust Craft Broadcasting Co., permittee of UHF station WJKS-TV, Jacksonville, Fla.; AMST comments, p. 71.)

The above examples are not cited at this point for the correctness of the attitude taken toward CATV penetration in the particular situation, but rather for the attitude.[60] We think it important, in view of the critical period facing UHF, that the UHF entrepreneur be given a forum for thorough exploration of this serious problem.

128. The contentions of some of the parties with respect to pay-TV are also pertinent here. Several parties (e.g., ABC, Westinghouse, AMST) have stated that CATV, particularly if it succeeds in the major cities, can readily branch out into pay-TV (for example, by providing that one channel will be "original" programing available only for a specific additional charge—a form of pay-TV somewhat akin to the Bartlesville experiment in 1957–58). The parties assert that whether or not pay-TV is desirable, it should be initiated only after full consideration in an appropriate proceeding and not "come in the back door" through CATV operations and profits based on the sale of the broadcast industry's product.

129. Whether a form of pay-TV operation will result from CATV is uncertain and would appear to depend again very largely upon the growth factor, particularly in the larger cities which would naturally be the backbone of any wire-pay-TV operation. But we would agree that in the circumstances its authorization should stem from the Commission (or the Congress) after appropriate proceedings. For, what is involved is not the strictly wire-pay-TV proposals such as recently attempted in California. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals (to provide the economic base for the pay-TV "frosting"), and such use of broadcast signals should be allowed only if it is found to be in the public interest. We have petitions now under consideration, which seek the authorization of pay-TV on a regular basis using broadcast facilities, perhaps only in the UHF portion of the spectrum. It is clear that until resolution of the very important policy issues, pay-TV operations based in substantial part on use of broadcast signals is inappropriate. Since here again the critical factor is the growth of CATV in the larger cities, we think that this is added reason for the policy and procedure we have adopted, since that procedure will be especially applicable to such cities. We intend to explore thoroughly the relationship, if any, of proposed CATV operating in the larger markets and the development of pay-TV in that market. This is a matter which is also involved in part II of

[60] We note also that the contrary opinion has been expressed by some new UHF entrepreneurs (namely, that CATV operation will aid, rather than hurt them).

this proceeding, and will be the subject of a specific legislative recommendation of the Commission. See paragraph 153, infra.

130. We believe that the foregoing discussion, showing the serious question posed by the potential effect of very substantial CATV development upon UHF development and the possible adverse consequences to the public interest, demonstrates the need for the major market, distant signals policy which we have adopted. Before discussing that policy (see pt. 3, infra), we shall turn to a second ground which also, in our judgment, supports the need for the policy.

2. Fair competition

131. We have previously discussed this "fair competition" ground in connection with the nonduplication requirement. See first report, paragraphs 52–57, 28 F.C.C. 683, 703–706. That discussion, which will not be fully repeated, is pertinent here. As shown, the CATV industry is growing at a tremendous pace, with a changing nature (entry into major markets, with 12- or 20-channel systems, bringing the signals of big city independents such as those of New York and Los Angeles). If the CATV should achieve substantial penetration of these communities (50 percent or over), the result might be most serious for the new UHF independents in these same areas. This points up a critical consideration—that the nonduplication requirement will be of virtually no assistance, since what is involved is the establishment and healthy maintenance of *independent* stations, and nonnetwork syndicated or film programing is not distributed on a simultaneous nationwide basis. We therefore shall reexamine the fair competition considerations in the context of the present problem—the CATV and UHF trends and the need to develop a policy or procedure because of these trends.

132. A television station normally obtains the right to exhibit nonnetwork programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount and kind of exclusivity that can be created is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process, and this exclusivity is maintained, in large part, through the operation of section 325 of the Communications Act, which forbids the rebroadcasting of any station's signal without the consent of the originating station.

133. We have pointed out how the CATV system presently stands outside of the above program distribution process (pars. 54–55, first report, 38 F.C.C. at p. 704):

> **[The CATV] has not been found subject to the requirements of section 325. [footnote omitted] It does not compete for network affiliation, nor for access to syndicated programs, feature films, or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal**

is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier—although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.

This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product—the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.

134. The anomalies which result from this situation are even more marked in the case of the independent station, particularly in light of the recent CATV trend. Procuring attractive programing which will interest viewers is, of course, the most vital concern of the new UHF independents. For example, such stations may bid for and obtain exclusive rights to an attractive feature film package. No other station in the same market could show these films—but a CATV system, which never entered the bidding, might well bring in these same films from a distant market. If the CATV reaches very significant proportions—50 percent or more, the result is the loss of the exclusive right for which so much was paid and upon which so much may have been staked. And here we stress again that without the financial sustenance from entertainment programs, a station has no adequate economic base to serve as an outlet for local expression for all the people in its service area.

135. When the situation is viewed on an overall basis, rather than from the viewpoint of individual programs, the result is equally anomalous. The CATV seeks to secure as great a number of subscribers as possible in these major markets, aiming for a figure well over 50 percent if possible. Since the people in these markets have three full network services, it seeks to attract such a large number of subscribers, in large part, by bringing in the independent programing of distant big city stations such as the New York or Los Angeles independents. And it obtains such programing by simply paying a common carrier to bring to it the signals of these distant stations (or by itself erecting a tall antenna on an appropriate high elevation to receive the signals and then relay them with suitable amplification along the way to the subscriber). The new UHF station also seeks to attract as wide an audience as possible in these same markets by bringing in attractive nonnetwork programing. But the UHF station cannot, either by means of a common carrier, its own microwave relay, or a tall antenna, decide that the best way to obtain such programing is simply to bring in, in whole or in part, the programing of the New York independents. The established distribution process given congressional recognition in section 325(a), proscribes such conduct. (See letter to Mr. Martin E. Firestone, dated Dec. 16, 1965, FCC 65–1107.)[61] Both the

[61] As another example, in 1965, station KWOA desired to rebroadcast the signal of station WCCO, to present the play-by-play broadcasts of the Minnesota Twins' baseball games. Station WCCO refused rebroadcast consent, largely because it placed a good signal into the area in question. This Commission determined that in view of WCCO's response and the particular circumstances, no action was called for. See letter to Mr. James J. Wychor, dated July 22, 1965.

broadcaster and the CATV thus have the same objective—providing as large a segment of the public as possible in these major markets with access to nonnetwork programs. The question therefore arises why the CATV should operate under one set of competitive rules and the broadcaster under an entirely different set. On its face, this competitive situation would appear to be a most unfair one.

136. Illustrations in the sports area further point up this anomalous situation and are particularly pertinent in view of the importance of sports programing, both to the CATV and broadcasting. The broadcast station (or its network) bids for the right to exhibit sports programing (see, e.g., $37.6 million bid for CBS for the 2-year right to show NFL football games; Broadcasting Magazine, Jan. 3, 1965, p. 124); even then, those rights are at times circumscribed by blackout requirements (during home games), and other conditions permitted by Congress or the antitrust laws. See, e.g., Public Law 87-331. The broadcaster must operate in accordance with these established industry conditions. But the same sports program that is unavailable to the broadcast station is presently made available to the station's audience by CATV systems. In the words of the president and general manager of Wisconsin Valley Television Corp. (AMST comments, attachment B, p. 10, quoting the House CATV hearings on H.R. 7715, p. 415):

> Another serious problem: In Wausau, Wis., because of our proximity to Green Bay, WSAU-TV is blacked out of the Green Bay Packers football games. This I can understand on behalf of the National Football League and the Green Bay Packers * * *. I'm not allowed to carry the games. Any cable system can reach to any area and get these games—some via microwave. Then these games can be moved into WSAU-TV's area. Can our station sit on a Sunday without the football game, while the cable system is running big ads in the local newspaper; "Get total television on cable television."
>
> Now I would like to deliver total television but because of laws and rules and regulations, I'm not able to give total television. The cable system, with no laws, no rules, no regulations, can deliver to my audience, by FCC definition of tower height and power, much more television than I can deliver to them because of the stricture that I must operate under * * *."

137. The answer is sometimes given that the CATV system is simply a master TV antenna, and therefore on this ground should be allowed such different competitive conditions. But this answer does not withstand analysis. A CATV system which proposes to employ microwave to bring in signals 400 or 500 miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York independents to Dayton or the Los Angeles independents to Dallas-Fort Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gear to distribute the distant signals. In any event, the question remains: If the distant signal is freely available for use in the area, as the CATV argues, why is it not just as freely available for use by the broadcast stations in the area (e.g., through a tall antenna on a high elevation). Clearly, however, it is inconsistent with all notions of propriety to say that a Philadelphia or Baltimore UHF station may make whatever use it desires, without permission or payment of the programing car-

ried over the New York independents. See section 325(a), and its legislative history. The result of such "freedom of access" would be gross inequity and chaos.[62]

138. Here again we have reached no final determination but rather have concluded that this is a question warranting thorough exploration in the hearing process. It may be that whatever the disparate conditions for operation, there is no need for concern because the CATV will not significantly affect the development or healthy maintenance of UHF television broadcast service. But as stated we cannot make that determination on the record now before us. It follows that on this ground also, there is need for a procedure pegged to full exploration of the issue in the context of an evidentiary hearing.

3. The major market, distant signal policy, and procedure

139. We have previously found that CATV can make an important contribution to the public interest, and we adhere to that judgment. CATV, along with other auxiliary services, has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services. In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest "in the larger and more effective use of radio." And, even in the major market, where there may be no dearth of service (e.g., Philadelphia, with three full-time network services, and four independent UHF stations either on the air or authorized), CATV may, we recognize, increase viewing opportunities, either by bringing in programing not otherwise available or, what is more likely, bringing in programing locally available but at times different from those presented by the local stations. But this contribution (and related ones such as better reception, etc.) should not be made at the expense of healthy maintenance of UHF operations. We have reached no determination on this critical matter. Rather, we have decided that a serious question is presented whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature. We have also indicated our concern with the relationship, if any, of proposed CATV operations on the large markets and the development of pay-TV in those markets.

140. Our policy and implementing procedure are therefore addressed squarely to these serious questions. The basic thrust of con-

[62] The answer that the CATV does not have a "free ride" in view of the cost of the cable system, misses the point, since the cost of the disseminating system is no basis for exemption from observance of the fundamental distribution process by which the program product is obtained. Both the CATV and the UHF station have substantial costs of construction maintenance and operation. Thus, the most recent UHF station in Chicago, Ill., had a construction cost of about $3,000,000, with substantial estimated yearly operating expenses, including those sums allocated to programing costs. The UHF station cannot appropriate the programing of the New York independents, without consent or payment, no matter what its costs are.

gressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. (Cf. sec. 309 of the Communications Act.) We think that that policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as secs. 1, 4(i), 303 (h), (g), (r), (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

141. We shall accordingly follow a procedure whereby the signal of a television broadcast station shall not be extended beyond its grade B into the top 100 major markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) by a CATV system which has obtained a franchise for operation in such a market, except upon a showing made in an evidentiary hearing that such operation would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service. In this way, the Commission will be able to explore in depth the details of the proposed CATV operation, the marketing studies which have been made relating to it (by either the CATV or broadcast groups in the area), the present and potential picture as to television broadcasting in the market, the positions and showings of the interested CATV and broadcast parties, the possible plans or potential of the proposed CATV operation for pay-TV, and other important facets. After such exploration, the Commission will be in a position to make an informed judgment directed to the facts of a particular case.

142. We believe that the procedure which we have adopted is fair and best suited to promote the public interest, taking into account both the development of the broadcast and the CATV industries. It is in line with the urging of several parties that what is needed is full evidentiary hearing. While the hearing urged has usually been one of an overall nature, we believe it best to consider these important matters in the context of the particular request and the particular situation.

143. We recognize that the evidentiary hearing may consume some significant period of time. But as stated, the public interest requires thorough exploration of the very important issues raised; they cannot be sloughed aside or the answers lightly assumed. Further, the requirement for an evidentiary hearing has been confined to the top 100 markets, where there is generally no dearth of service and new UHF services are coming on the air. For example, in Philadelphia, there are three VHF network affiliated stations, three UHF inde-

pendents on the air, with a fourth authorized. In the markets below 100, where there may be a greater present need for additional television service, the general *requirement* for evidentiary hearing is inapplicable. See paragraph 146, infra.

144. We have selected the top 100 markets for special attention because it is in these markets that UHF stations or wire pay-TV based upon CATV operations are most likely to develop and therefore the problems raised are most acute.[63] Further, as noted, any delay in commencement of CATV operation because of the necessity for evidentiary hearings is mitigated by the consideration that these markets generally have a considerable amount of presently available and prospective new service. Finally, the top 100 markets include roughly 90 percent of the television homes in this country. Our policy therefore focuses on the critically important areas.

145. Admittedly, there can be substantial problems affecting the public interest where the CATV system proposes to extend the signals of broadcast stations beyond the grade B contour into areas below the top 100 markets. But there are differences between the two situations which call for different procedures. In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the nonduplication provision is effective (since network programing will be significantly involved), and protection of a station's network programing should contribute very substantially to insuring its continued viability. It would appear that network programing will continue to be available in such markets; in the unlikely event that such programing becomes unavailable because of CATV impact, there would appear to be other appropriate remedial action which can be taken. Further, it is in the markets below 100 that there may be underserved areas where CATV can make its most valuable and traditional contribution. Indeed, the market division which we adopt is really a division between CATV in its traditional sense and the new, revolutionary facet of CATV, as posed by its entry into the major markets. It is the latter which peculiarly requires the most thorough examination in the context of an evidentiary hearing.

146. We think, therefore, that a fair compromise is to draw the line as to special attention (i.e., evidentiary hearings) at the 100th market, and below that point, simply to take such action as may be

[63] Some question may arise as to whether a particular system is located in a market coming within the top 100. For clarification, we have specified that the above provisions are applicable to a CATV located in a community coming within the predicted grade A contour of any station in one of the top 100 markets. We have employed the grade A contour of any station since, while stations often are located at different sites or have different powers or heights (and thus different A contours), these grade A service areas in the same market have a tendency of becoming fairly close to one another over a period of time. In any event, we think that this is an appropriate criterion since it encompasses the essential area upon which new UHF broadcast operations in the market would be based, without including the much larger areas falling within the grade B contours, as has been urged by some in this proceeding. Because our effort is to carve out such an essential area upon which new UHF development would be vitally based, we have employed the predicted grade A contour; use of the predicted contour should also have the advantage of definiteness and easier administration. In the unusual instance where the requirement may be inappropriate, waiver can be sought. Where a CATV system is located within the top 100 markets when a hearing is commenced, the hearing will be continued even if these markets change in a subsequent ARB rating. We note that the 1965 ARB listing makes no change in the 1964 listing of the top 100 markets except as to relative standing within the 100.

necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention. See paragraph 98. We shall not necessarily hold evidentiary hearing in connection with such petitions in the smaller markets. Such hearings could be a considerable burden both upon the CATV operation and the broadcaster in these small communities. See paragraph 78, first report, 38 F.C.C. at page 714. Indeed, the hearing might thwart the initiation of needed service. Therefore, while hearings might be held in some instances, we have devised flexible procedures generally to treat expeditiously petitions or requests involving the markets below 100, since we recognize that to hold hearings upon each such petition or request might be burdensome to all parties involved and to the public.[64]

147. *The question of grandfathering.*—On February 15, 1966, we issued a public notice giving the essence of our determination in this respect. Systems not yet in operation on February 15, 1966, and proposing to extend the service of a station beyond its grade B contour into one of the top 100 markets will come within the scope of our major market procedure, and must make the necessary showing in an evidentiary hearing. In view of the very great desirability of avoiding the disruption stemming from action applicable to an operating system and the strong public interest considerations underlying our policy, we think good cause exists for immediate effectiveness of the major market rules upon their publication, as suggested by some of the parties. A line must be drawn as to "grandfathering," and we believe it appropriate to do so upon the basis of operation on the date of the public notice. A system which has gone into operation by extending signals beyond their grade B contour to subscribers in the top 100 markets for the first time after that date, would be subject of a cease-and-desist proceeding.[65] Since we shall not "grandfather" systems coming into operation after February 15, 1966, the effectiveness of our action, practically speaking, is geared to that date. We could follow normal procedure and wait until 30 days after publication in the Federal Register to proceed against systems commencing operation after February 15, 1966, in the top 100 markets. But we do not believe that this hiatus would serve any useful purpose or the public interest. For, in the interval, a system might commence operation after the February 15 date and make "drops" to a significant number of subscribers, all of whose CATV service could be ended when the Commission instituted cease-and-desist proceedings as to the CATV operation. In the circumstances here, where "grandfathering" is pegged to the February 15 date, we think that orderly procedure and the desirability of avoiding disruption as much as possible call for immediate Commission action,

---

[64] As previously stated (n. 51, first report, 3 F.C.C. at p. 715), we will, as required by the Communications Act and consistently with its procedural specifications (e.g., sec. 309), examine any question raised in connection with individual microwave applications which bears on the public interest in the particular applications involved.

[65] We recognize that this may catch some systems just prior to the commencement of operation. But this will always be true in the case of any policy in this area, and in any event, if the policy is to be effective and achieve the above described goals, it must be implemented immediately. We also point out that parties have known of the Commission's proposals for a major market procedure since Apr. 23, 1965 (and of the counterproposals since July 26, 1965). The notice expressly "* * * put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not" (notice, par. 65, 1 FCC 2d at 477). Finally, in the unusual case, we can consider the matter upon petition for waiver.

rather than the Commission waiting passively on the sidelines for the 30-day period to expire. Good cause therefore exists to make the rules as to the major market procedure effective upon publication, so that we may proceed forthwith against any system operating in contravention of those rules.[66]

148. The essential purpose of our policy is to take hold of the future—to insure a situation where we or the Congress, if it chooses, can make the fundamental decisions in the public interest upon the basis of adequate knowledge. So far as the application of our major market distant signal policy, we do not intend to disrupt the existing situation, by withdrawing from any CATV subscriber any signal which he was receiving as of February 15, 1966, in the top 100 markets or which he is presently receiving in other markets.[67] Based on our experience, we regard such a withdrawal as impractical and, in any event, we note that we have not made any basic policy judgment which would warrant such undue disruption. We therefore shall "grandfather" all systems which were in operation upon February 15, 1966 (the release date of the above mentioned public notice), to the extent that such systems need not make the showing in section 74.1107 to continue to carry to subscribers signals beyond their grade B contour, which were being supplied to those subscribers on that date. But any addition of a new distant signal on an existing system in the top 100 markets would come within the major market policy.

149. The foregoing dealt with grandfathering. We turn now to the question whether systems extending signals beyond their grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographical areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing).[68] While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the

[66] Similar good-cause grounds are applicable to the provision of the rule dealing with markets ranked below the 100th (74.1107(c)), since the public interest would not be served by permitting situations to continue to develop which raise substantial questions and may result in either disruption of service or inability to take an otherwise desirable action because of the factor of disruption. We shall also make effective upon publication the procedural provisions (secs. 74.1105, 74.1109) which relate to sec. 74.1107.

[67] As to the application of our carriage and nonduplication rules, see pars. 49, 68, 106.

[68] And certainly where a new franchise or amendment of an existing franchise after Feb. 15, 1966, to operate or extend the operation of the CATV system in the same general area is involved, the requirement of an evidentiary hearing will be applicable.

geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and responses in the particular case, whether such temporary relief is called for, and if so, its nature. In view of the nature of the problem, the Commission will give expedited treatment to petitions in this area. Finally, we wish to stress one important facet: We have previously put all parties on notice as to the pendency of our proposal and have now put parties on notice that there should not be expansion of major market systems from a few thousand subscribers to a very substantial number of subscribers until resolution of the public interest issues posed. We expect CATV operators to heed this notice and not to attempt to circumvent orderly consideration of any petition in this respect by an extraordinary effort to wire up the community or a substantial portion of it. In any event, we are requiring the submission of data showing the extent of construction of the system as of February 15, 1966. While we expect the ordinary wiring operations to have continued since that date, any extraordinary wiring efforts or entry into patently new geographical areas (e.g., extension of a system from a suburb into the main community) will be at the risk of the system and will not be accorded weight in the judgment to be made.

150. As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are our best judgment of what the public interest now calls for. We recognize that they may not perfectly fit every situation, and repeat that should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192.

151. Finally, we stress that the rules do not halt CATV service or growth. With the possible exception of the applicability of our carriage rules (see par. 66), the CATV viewing public will not be deprived of any distant signal service which it was receiving as of February 15, 1966. CATV will not be precluded from bringing new service to underserved areas or from bringing better reception in cities such as New York. With possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its grade B contour may freely continue.[69] CATV expansion into markets below the top 100 may also continue and will be the subject of Commission scrutiny only upon petition in a particular case. Thus, we have confined our special attention to the area of most concern—the top 100 markets where UHF stations are most likely to be coming into existence. And, in line with our present general policy in dealing with microwave applications (see par. 49, notice, 1 F.C.C. 2d at p. 471),

[69] If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.

we have specified no "freeze" but rather a full exploration of the facts of each case, so that we may make an informed judgment on this most important question. We believe that this is a reasonable way to proceed, and that the public interest requires no less a procedure.

152. *Legislative proposals.*—The foregoing discussion treated matters in part I and paragraph 50 of the notice of proposed rulemaking. The remaining matters in part II of the notice will be considered on the basis of the comments filed in that part and the experience gained. For the reason also, this report is designated as the second report. We turn now to a brief discussion of the legislative proposals which we believe are desirable.

153. There are four areas which we shall urge to the Congress as particularly warranting its attention:

(i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in this field. See notice, paragraph 31, 1 FCC 2d at page 465.

(ii) We believe that congressional consideration of the pay-TV aspects of CATV is particularly called for. For the reasons stated in paragraphs 128–129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industry's signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industry's product as a basis for wire-pay-TV operation which could adversely effect that industry or indeed supplant it. More important, were wire-pay-TV to supplant free television broadcast service, it would be inconsistent with the public interest, since it would mean that the public would receive, at least in large part, the same service it now does, but for a fee. Finally, we are considering petitions seeking the authorization of pay-TV in the broadcast spectrum.

(iii) We believe that Congress should consider whether there should be a provision similar to section 325(a) applicable to CATV systems (i.e., whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditions under which the broadcasting and CATV industries compete. See paragraphs 131–138.[70] Several parties

[70] The problem is further pointed up by the recent controversy involving the telecasting of certain of the Notre Dame home or away games by station WNDU–TV, South Bend, Ind. See letter to Mr. Asa S. Bushnell, dated Oct. 28, 1965, public notice, dated Oct. 29, 1965, mimeo 75429. Under the NCAA television regulations, the station was allowed to telecast such games, but permission to do so was temporarily withdrawn because CATV systems, without WNDU–TV's consent, would then pick up the station's signal and carry it to areas not coming within the regulations. The NCAA television committee, while it is continuing to study the matter, recently adopted a new regulation stating:

"Any televising privilege granted under article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such station or stations. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable, or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature. (Report of the 1965 NCAA television committee, Jan. 10–12, 1966, p. 31)."

Under this unusual situation, the local broadcast station could lose the opportunity to present a program of great interest to its area (as the NCAA plan recognizes in its regulations), because CATV systems over which it has no control carry the program beyond the specified local area (conceivably for hundreds of miles).

Indeed, the anomalous conditions could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network.

such as NBC have urged that a section 325(a) approach would obviate the need for much, if not all, of the Commission regulations in this area and would serve the public interest. We are not in a position to state whether a section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting congressional (and Commission) consideration, including such aspects as how a "retransmission consent" requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

(iv) Finally, Congress will be asked to consider the appropriate relationship of Federal to State-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

CONCLUSION

154. Authority for adoption of these rules is contained in sections 1, 4(i), 303, 307(b), 308, and 309 of the Communications Act. We wish to stress particularly the provisions of section 1 that the general purpose of the act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission * * * under licenses granted by Federal authority"; of section 303(h), "to establish areas or zones to be served by any station"; of section 307(b), to make "a fair, efficient, and equitable distribution of radio service" among the several States and communities", section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule-making power bestowed upon the Commission in sections 4(i) and 303(r), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger and more effective use of radio in the public interest." Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" (*FCC* v. *Pottsville Bctg. Co.*, 309 U.S. 134, 138; see also *NBC* v. *U.S.*, 319 U.S. 190).

155. In this connection, we stress that we are not committed to the status quo—to protecting existing investment against new technological advances. The whole history of this art has been one of great change, from radio to television to perhaps tomorrow satellite broadcasting or laser communication. It may be that CATV, if allowed full unfettered growth, would prove to be an excellent supplement, bringing additional service and diverse programing to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire Nation. If so, the information obtained in the hearing process will provide that indication, and will be the basis for authorizing such growth. But we cannot make that judgment in the record now before us—and, instead of the above picture of wire television as an excellent supplement, there is the possibility that the Nation might find itself with a system half wire, half free, which is destructive of the larger goals of additional networks, additional outlets for local expression, and which provides increased service to some in the city at

the expense of those in the rural area or those who cannot afford to pay. It is, we think, time to get the facts, and in light of the service presently available, there is time to get the facts.

156. Accordingly, *It is ordered*, This 4th day of March 1966, that the rules contained in the attached appendix D are adopted, effective April 18, 1966; *Provided, however*, That the provisions of section 74.1103 are not effective as to existing operations of nonmicrowave CATV systems until 60 days thereafter, and provided further that the provisions of sections 74.1105, 74.1107, and 74.1109 are effective immediately upon publication in the Federal Register.

It is further ordered, That pursuant to section 403 of the Communications Act, all CATV systems in operation on April 18, 1966, shall within 30 days thereafter file with the Commission the information described in paragraph 99 of this report.

It is further ordered, That the proceedings in docket No. 15971 *Are not terminated* and that, in light of the comments on part II of docket No. 15971 and/or such further proceedings as the Commission may order, amendments may be made to the rules set forth in the attached appendix C or additional rules may be adopted.

It is further ordered, That the proceedings in dockets Nos. 14895 and 15233 *Are terminated*.

APPENDIX A

Comments and/or reply comments on part I and paragraph 50 of this proceeding were filed by:

AFL–CIO affiliated labor organizations
Allied Artists Television Corp.
American Broadcasting Co.
American Cable Television, Inc.
American Farm Bureau Federation
American Telephone & Telegraph Co.
Aroostock Broadcasting Corp.
Association for Competitive Television
Association of Maximum Service Telecasters, Inc.
Black Canon Broadcasting Co.
Bonneville International Corp.
Clearview of Georgia, Inc.
Columbia Broadcasting System
D. H. Overmyer
Entron, Inc.
Eastern Educational Network
Fuqua Industries, Inc.
G. T. & E. Service Corp.
Houston Post Co.
International Telemeter Corp.
Jack O. Gross, d/b/a Gross Broadcasting Co.
Jerrold Electronics Corp.
Journal Co.
Joint comments of stations KHOU–TV, KOTV, KXTX, WANE–TV, WAVE–TV, WFIE–TV; WFRV, WISH–TV, WJXT, WMT–TV, WNOK–TV, WTOP–TV
Meredith Broadcasting Co.
Mesa Verde Broadcasting Co., Inc.
Micro-Relay, Inc.
Midwest Television, Inc.
Mobile Video Tapes, Inc.
National Association of Broadcasters

National Association of Educational Broadcasters
National Broadcasting Co.
National Community Television Association, Inc.
National Educational Television
National Farmers Union
National Grange
Phillips, Nizer, Benjamin, Krim & Ballon
Rogers TV Cable, Inc,
Rust Craft Broadcasting Co.
San Diego Telecasters, Inc.
Smith & Pepper (on behalf of over 150 CATV systems)
Snyder & Associates
Springfield Television Broadcasting Corp.
Storer Broadcasting Co.
Superior Broadcasting Corp.
Taft Broadcasting Co.
Telerama, Inc.
Triangle Publications, Inc.
Tri-State TV Translator Association
Trans Video Corp.
TV Cable Service of Abilene, Inc.
U.S. Independent Telephone Association
West Central Broadcasting Co.
Westinghouse Broadcasting Co., Inc.
Western Slope Broadcasting Co., Inc.
WGAL Television, Inc.
WJAC, Inc.
WKBH Television, Inc.
WTVY, Inc.
William L. Fox

APPENDIX B

SUMMARY OF COMMENTS ON PARAGRAPH 50

National Community Television Association (NCTA) urges that a rule along the lines of the policy adopted in paragraph 49 and proposed in paragraph 50 is "completely arbitrary," "unnecessary," and "would be a virtual prohibition to provide CATV service in such communities (NCTA comments, pp. 13–14). By way of support NCTA quotes at length (NCTA, exhibit B, pp. 14–22) from the discussion in the Seiden report concerning "CATV in Three-Station Markets" (pp. 84–86) and from the Fisher report concerning the effect of noncarriage on audience and revenues where there are three or more off-the-air program alternatives (pp. 91–92). NCTA states that the Seiden and Fisher conclusions "show conclusively that there is absolutely no basis for allegations of CATV as an adverse factor in the potential development of UHF television in large cities" (NCTA, exhibit B, pp. 22, 32). NCTA asserts further that there is no criterion for determining whether a CATV system might at some time have the effect of delaying construction of a UHF station in a three-station market (NCTA comments, p. 14, exhibit B, p. 31). Finally, it states that the existence of a CATV system in a community has not in the past prevented construction of a successful VHF or UHF television station in the community (ibid.).

Other comments on behalf of CATV interests challenge the proposed paragraph 50 rule principally on the ground of alleged lack of jurisdiction over CATV systems. It is asserted in addition that CATV will help UHF by providing good quality reception to an immediate audience prior to all-channel set saturation. Because of this, some UHF permittees in major cities have indicated no objection to CATV entry. It is further asserted that the success of independents will ultimately depend on their ability to provide a program service which will attract viewers and advertisers. International Telemeter Corp. states that if and when CATV systems are established on a broad base in large metropolitan areas, they may well be utilized for pay-TV operations as an adjunct to other forms of wire television (Telemeter reply comments, p. 11). But, Telemeter adds (ibid.), "this is not to say that the public interest will not be served by the result * * *": "the multiplicity of services via wire television systems can only serve, not harm, the public interest."

The comments of the American Broadcasting Co. (ABC) support the proposal. ABC states that a CATV operator in a market such as Philadelphia could carry the several New York independents to the very serious detriment of the local Philadelphia UHF stations, and that the carriage and nonduplication rules presently adopted by the Commission are not truly responsive to the "unexpected fractionalization of the audience interested in independent programing." ABC therefore believes that the Commission should "establish the areas or zones" normally to be served by television stations and delineate the circumstances under which a station's signals may properly be brought to areas not within its normal service area. It asserts that interim rules, pending the adoption of final rules in part II, are needed because once CATV systems are established in markets that have a potential for independent UHF station development in the reasonably near future, the Commission will find itself in the impossible position of trying to undo what has already been done—of possibly adopting a regulation which would deny to substantial numbers the service which they assumed they would receive and for which they have already paid. ABC therefore urges the adoption of a rule prohibiting any person from transporting the signal of a TV station beyond its grade B contour into a community within the range of four or more commercial grade A assignments and receiving grade A or better service from three or more commercial TV stations (or two such stations with a third station already authorized). ABC states that such a rule would apply basically to all but three of the Nation's top 100 markets and therefore to those areas which now or shortly will have three or more local network services and the reasonably immediate likelihood of a fourth commercial service; that with this amount of service, these areas do not have any pressing need for additional service via wire, and they are also the areas which hold the most possibilities for UHF development; that the interim procedure would insure that a significant pay-TV service would not be established while the Commission is reaching its final decision in this proceeding and in the pay-TV rulemaking proceeding that has recently been requested; and that at the same time, the interim procedure will not preclude the development of CATV in these relatively underserved areas where it serves as a needed adjunct to free television service. Above all, ABC stresses that the proposed rule will prevent the establishment of CATV systems in areas and under conditions which the Commission may ultimately conclude would inhibit or prevent the normal development of UHF television.

Westinghouse in its comments takes a position similar to that of ABC. It urges a restriction upon the importation of signals into communities situated within the grade A coverage of four or more commercial TV assignments and communities within the grade A coverage of three or more commercial stations actually in operation (with exceptions (i) for two station markets with an outstanding construction permit for a third station where such permit is not activated within 6 months, and (ii) to areas within the grade A coverage of three stations not receiving the full service of the three networks because of the existing network affiliation relations). It asserts that many applicants for CATV franchises in big cities today are promising to deliver such stations as WOR–TV and WNEW–TV, New York, and WGN–TV, Chicago; that these are well-established, independent stations in major markets, and, compared with a UHF station just getting started in another city, have a much greater economic base to make major expenditures for programing; and that the local UHF station, competing with these major stations for what is at best a limited audience (i.e. the audience for nonnetwork programing), will be unable to get a large enough share of this audience necessary for it to produce the income needed for the station to buy programing with which it can *in fact* compete for viewers with the other stations on the system. It states that CATV only brings its service to some viewers—those fortunate enough to live in areas with a large enough local population to furnish an economic base for the laying of CATV cable, and then only those living in such areas who can afford to pay CATV fees. Westinghouse asserts that CATV in big cities also has the obvious potential of transforming itself into pay-TV, and points to recent news reports that tell of a company which was unsuccessful in its efforts to operate a pay-TV system in one city in Canada and is now planning to take over a successful major CATV system in another Canadian city and convert it to pay-TV in whole or in part. Finally, Westinghouse stresses the need for an interim rule, stating that once CATV franchises are granted in the larger markets and construction of the systems

is commenced pursuant to those grants, the Commission, from a practical and political viewpoint, will have lost effective control of the situation in those areas.

Storer Broadcasting Co. also supported the proposal because, it asserts, there is a definite probability of serious impact on television development in such cases, and the Commission cannot, through inaction, permit events to occur which jeopardize the goals set by the Congress and the Commission looking toward a competitive nationwide system of intermixed local television facilities. It urges that there is an established immediate need to "hold the line," during the interim period, on importation of distant signals to the major markets where CATV's "present stampede" into these markets might destroy the independent stations' audience potential "through importation of competitive programing on unequal terms" (Storer comments, p. 12). Storer also states that if the policy is to be effective, it should be applied to affiliated as well as independent UHF stations, and that it should be extended to CATV systems in nearby communities upon which the UHF depend for audience circulation. It asserts that a UHF station, although nominally a network affiliate, may still rely largely on independent programing, and that therefore its development requires the same protection as that proposed for independent UHF operators; and that CATV systems in nearby communities "can impose drastic damage on that station's audience circulation, particularly on a cumulative basis." (Id. at p. 14.)

The Association of Maximum Service Telecasters (AMST), Midwest Television, Inc. (Midwest), and the joint comments of KHOU–TV, KUTV, KXTX, WANE–TV, WAVF–TV, WFLE–TV, WFRV, WJXT, WMT–TV, WNOK–TV, WTOP–TV (joint comments) all urge the adoption of interim procedures going beyond those proposed in paragraph 50. The factual basis of AMST's and Midwest's comments have been described in part (see pars. 31–41). In addition, AMST cites the experiences of the UHF station in Lock Haven, Pa., and of UHF station WRLP, Greenfield, Mass., in the face of CATV competition. AMST asserts that the importation of outside large city independent television stations by CATV will be an obstacle to the development of a fourth network, since it will jeopardize the development of the UHF stations in these cities. AMST also states that the entry of CATV into larger cities poses a substantial threat to the development of network UHF service, citing in support statements made to the Commission or to the Congress of Rust Craft Broadcasting Co., permittee of WJKS–TV, Jacksonville, Fla., and WCCB–TV, a new UHF station in Charlotte, N.C., Midwest describes the explosive growth of CATV in the Peoria-La Salle area, the Springfield area, the Champaign-Danville area, the WCIA service area generally, and the San Diego area (see pars. 34, 39–41). The joint comments assert that proposals to bring multiple distant signals into areas such as Fort Wayne, Ind., Columbia, S.C., Jacksonville, Fla., and Indianapolis, Ind., jeopardize or foreclose the development of new UHF stations in these areas. The joint comments point out that in the area served by the existing Sacramento-Stockton stations, CATV systems have been franchised or have commenced operations in at least 31 communities, and applications for franchises have been filed or proposed in at least 18 more—including Sacramento and Stockton themselves; that the total number of households in these cities and communities is more than 250,000, representing a major portion of the audience now served by the three existing Sacramento-Stockton commercial stations and a still more substantial portion of the audience which would be served by KPXL, the newly authorized UHF station on channel 29 in Sacramento; that as the permittee for the new UHF station in Sacramento has informed the Sacramento City Council, the importation of outside signals from San Francisco-Oakland and Los Angeles stations, as proposed, would make it impossible for the new UHF station to survive.

AMST, Midwest, and the joint comments propose the interim rule that no CATV system shall be permitted to extend the signal of any television broadcast station beyond its grade B contour except upon a clear and full showing, (*a*) that there are special circumstances, for example, that the community is remote and isolated and does not have, and cannot be expected, to receive in the future, direct off-the-air local or area television service; and (*b*) that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service

in the area. AMST urges that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rulemaking. It states that an alternative but much less satisfactory approach in view of the CATV activity since April 23 would be to apply the interim rule, (*a*) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (*b*) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

In reply comments ABC and Westinghouse assert that their interim proposal would better serve the public interest because it has been designed to prohibit the development of CATV in areas where it could adversely affect the overall public interest but not to prohibit its development where it could have little adverse effect upon the public interest and where there may well be a substantial public need for CATV services. In its reply, AMST asserts that its interim procedure would not have the effect of being a complete ban on CATV; that it would leave untouched the further expansion and development of CATV in its historic functions—(*a*) the providing of service to communities that are remote and isolated and do not have, and cannot be expected to receive in the future, direct off-the-air local or area television service, and (*b*) the providing of fill-in service, improving the off-the-air service of local and area television stations in pockets within their normal coverage contours where for terrain or similar reasons a desirable quality of service is not received. It further argues that if there are indeed situations in which a CATV entrepreneur can show that he will aid rather than threaten the maintenance or expansion of existing UHF stations and the development of new UHF service, appropriate interim rules and policies will leave it open to the CATV entrepreneur to make such a showing. AMST urges that the ABC and Westinghouse interim procedure are inadequate because they seek at the most to protect only those communities or areas which could utimately have *four* television stations; that even as to those communities or areas, three television stations must already be active or two must be active and the third imminent; and that the proposed rule would apply only in the grade A contours of those existing or imminent stations. AMST states that there is no reason—*at least* in the interim—to allow CATV to retard UHF development in *any* market. And that it is entirely possible for CATV systems in dozens of small communities to blanket most of the audience potential in the station's service area beyond its grade A contour; and that the area can thus be very effectively denied to a small UHF station—possibly the difference between survival and failure, and at least the difference between effective programing and ineffective programing.

APPENDIX C

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio * * * and to all persons engaged within the United States in such communication * * *." These terms are defined in section 3 of the act. Section 3(a) defines wire communication as the "transmission of * * * pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire *

radio. They transmit "pictures, and sounds * * * by aid of wire" and are "instrumentalities * * * [used for] * * * the receipt, forwarding, and delivery of communications * * * incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).[1] Moreover, CATV systems constitute *interstate* communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established * * * as interstate communication." *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266).[2] The law is clear that the mere location of communication facilities wholly within one State does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one State. *California Interstate Telephone Company* v. *F.C.C.*, 328 F. 2d 556 (C.A.D.C.); *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific Telatronics, Inc.*, FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, *Clarksburg Publishing Co.* v. *F.C.C.*, 225 F. 2d 511, 517 (C.A.D.C.), and hence constitute "interstate communication by wire" to which the provisions of the act are applicable (secs. 2(a), 3(a*f*). See *American Trucking Association* v. *United States*, 344 U.S. 298, 311.[3]

With respect to the Commission's authority to adopt the rules proposed in the notice of inquiry and proposed rulemaking, i.e., the "provisions of [the] act" that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As the notice and the report and order in dockets Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under sections 1 and 307(b) (i.e., the sixth report and order).[4] See *Carter Mountain Transmission Corp.* v. *F.C.C.*, 321 F. 2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963). The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to—

> perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions (4(i));
> make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * (303(f));
> establish areas or zones to be served by any station (303(h));
> make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act * * * (303(r)).[5]

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisions of this act (e.g.,

---

[1] It can be argued that CATV systems, in receiving, forwarding, and delivering the station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" in sec. 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to sec. 3(a) and the scope of the Commission's proposals. Since CATV operations clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the notice of inquiry and proposed rulemaking.

[2] Congressional approval of the *Capital City* doctrine was expressed in connection with the 1960 amendment to sec. 202(b). See 105 Congressional Record at 6256.

[3] It is, we believe, significant that, in sustaining the jurisdiction of the Interstate Commerce Commission in *American Trucking* the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 and 153 (a) and (b).

[4] In addition, as noted in the notice, there exists the potential to frustrate the purposes of the act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

[5] Secs. 303 (f), (h), and (r) are preceded by the following clause:
"Except as otherwise provided in this act, the Commission from time to time, as public convenience, interest, or necessity requires shall * * *."

secs. 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV—sec. 2(a)). Section 303(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for by section 307(b).[6] The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the Commission (secs. 4(i) and 303(r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV. In *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 215–220, the Supreme Court citing, *inter alia*, sections 1, 303(f), and 303(r), stated that:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * * In the context of the developing problems to which it was directed, the act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers,[7] the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)—to insure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the act. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203. See also, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218–219, where the Supreme Court stated:

> True enough, the act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * *. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.[8]

---

[6] Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st sess., pp. 40–41.

[7] See also, *Stahlman* v. *F.C.C.*, 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Congressional Record 8822–8823, 10313–10314, 10990); 66 Congressional Record 5479; S. Rep. 772, 69th Cong., 1st sess., pp. 2, 3.

[8] The Court, in referring to provisions of the act such as secs. 303 (g) and (r), stated (319 U.S. at 217–218):

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its

To the same effect in other fields, see *Houston, East and West Texas Railway Co.* v. *U.S.*, 234 U.S. 342; *U.S.* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *U.S.* v. *Pennsylvania R. Co.*, 323 U.S. 612; *American Trucking Assoc.* v. *U.S.*, 344 U.S. 298; *Public Service Commission of State of New York* v. *Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).[9]

The *American Trucking* case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

> Included in the act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rulemaking power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a)(19).

We point out that section 204(a)(6) of the Motor Carrier Act is substantially similar to sections 303(r) and 4(i) of the Communications Act; while in the circumstances, sections 202(a) and 203(a)(19) of that act are closely analogous to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the act," stating (at pp. 309–310):

> Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219–220; * * *. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created * * *.

See also, *Public Service Comm. of N.Y.* v. *FPC*, 327 F. 2d 893, 896–97 (C.A.D.C.). Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, 952 (C.A. 10). See also, *American Trucking Assn.* v. *U.S.*, 344 U.S., at 314–315; *National Broadcasting Co.* v. *U.S.*, 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission").[10] The report and order in dockets Nos. 14895 and 15233 demonstrates the appropriateness and necessity

---

signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."

[9] The *Public Service Commission* case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although sec. 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of sec. 16 of that act which are virtually the same as sec. 303(r) of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Sec. 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

[10] The Commission clearly has no jurisdiction over bowling alleys or theaters, for example, as an administrative agency has no greater power than has been conferred by Congress. *Stark* v. *Wickard*, 321 U.S. 288; *NLRB* v. *Atlantic Metallic Casket Co.*, 205 F. 2d 931 (C.A. 5). Cf. *Peters* v. *Hobby*, 349 U.S. 331. However, unlike bowling alleys and theaters, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in interstate communication by wire to which the act's provisions are expressly applicable.

of rules requiring all CATVs to carry local stations without duplication for a reasonable period. Moreover, the *Carter Mountain* decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition," but rather "a legitimate measure of protection for the local station and the public interest" (321 F. 2d 359, at 363–364). The notice of inquiry and proposed rulemaking similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent stations and programing sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are pertinent provisions of the act applicable to the exercise of authority over such systems (in particular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

APPENDIX D

I. Part 21 is amended as follows:

1. In section 21.710, paragraphs (a) and (b) are amended and a new paragraph (i) is added as follows:

§ 21.710 DEFINITIONS

As used in §§ 21.712 and 21.714:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include, (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

* * * * * * * *

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

2. In section 21.712, paragraphs (b), (c), (d)(3), (e), (g), (h), (i), (j) are amended; paragraphs (i)(4) and (k) are added; and note 2 to section 21.712 is deleted:

§ 21.712 AUTHORIZATIONS FOR FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS * * *

* * * * * * * *

(b) *Notification of request for service.* Any such CATV system or other subscriber proposing to utilize such service to relay television signals to any CATV system, either directly or indirectly, shall notify the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system operates or will operate in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the request for service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an

unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local area, and State educational television agencies, if any. Such notice shall include the fact of the request for service, identification of each CATV system to utilize the service requested (either directly or indirectly), identification of the community served or to be served by each CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

(c) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the station operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher powef.

(d) *Exceptions.* * * *

* * * * * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(e) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

* * * * * * *

(g) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (h) and (i) of this section.

(h) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(i) *Exceptions.* Notwithstanding the requirements of paragraph (h) of this section,

* * * * * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(j) *Disputes between television broadcast or translator stations and CATV systems; requests for waiver of the rules or for different treatment.* In the event that a dispute should arise, at any time, between a television broadcast or translator station and a CATV system served under an authorization subject to this section, on the question of whether the CATV system is complying with the applicable requirements, the matter may be referred to the Commission for a ruling pursuant to the provisions of § 74.1109 of this chapter, either by the licensee carrier, or by the station, or CATV system, with notice to the licensee carrier. Where a dispute has been referred to the Commission for a ruling or where a petition for waiver of the rules or for different requirements has been filed under § 74.1109 of this chapter, with notice to the licensee carrier, microwave service to the relevant subscriber shall not be commenced or terminated until 30 days after the Commission's ruling has been received by the licensee carrier.

(k) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

NOTE 1.—As used in § 21.712(b), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

II. Part 74 is amended as follows:

1. In section 74.1, paragraph (c) (4) is deleted, and two new paragraphs (d) and (e) are added to read as follows:

§ 74.1 SERVICES COVERED BY THIS PART

* * * * * * *

(d) Community antenna relay stations (subpart J).

(e) Community antenna television systems (subpart K).

2. In section 74.1001(e), subparagraphs (1) and (2) are amended as follows and a new subparagraph (9) is added as follows:

§ 74.1001 DEFINITIONS

* * * * * * *

(e) As used in §§ 74.1031 and 74.1033.

(1) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(2) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour shall be deemed an extension of the originating station.

* * * * * * *

(9) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

3. Section 74.1031(c) is amended to read as follows:

§ 74.1031 ELIGIBILITY AND CONTENTS OF APPLICATION

* * * * * * *

(c) An application for any authorization subject to § 74.1033 shall contain a statement that the applicant(s) have notified the licensee or permittee of any television station within whose predicted grade B contour the CATV system(s) operate or will operate in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of each such system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or permittees and educational interests. The notice shall include the fact of filing by the applicant(s), identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television, standard broadcast, and FM station(s) whose programs will be distributed by each such CATV system.

NOTE 1.—As used in § 74.1031(c), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

4. In section 74.1033, paragraphs (a), (b)(3), (c), (e), and (f) are amended; paragraphs (g)(4) and (h) are added; and the note to section 74.1033 is deleted.

§ 74.1033 LICENSING REQUIREMENTS * * *

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* * * *

* * * * * * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

* * * * * * * *

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of

equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

* * * * * * * * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

5. A new subpart K is added to read as follows:

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

Contents

SEC. 74.1101 Definitions.
SEC. 74.1103 Requirements relating to distribution of television signals by community antenna television systems.
SEC. 74.1105 Notification prior to the commencement of new service.
SEC. 74.1107 Requirement for showing in evidentiary hearing and Comission approval in top 100 television markets; other procedures.
SEC. 74.1109 Procedures applicable to requests for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

§ 74.1101 DEFINITIONS

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and grade B contours.* The terms "grade A contour" and "grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

§ 74.1103 REQUIREMENT RELATING TO DISTRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth-priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1105 Notification prior to the commencement of new service

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted grade B contour the system operates or will operate, and to the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until 30 days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least 30 days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within 60 days after obtaining a franchise or entering into a lease or

other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least 30 days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any. The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within 30 days after notice, new service to subscribers shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided*, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within 30 days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1966.

NOTE 1.—As used in § 74.1105, the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND COMMISSION APPROVAL IN TOP 100 TELEVISION MARKETS; OTHER PROCEDURES

(a) No CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system

to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the second report and order in dockets Nos. 14895, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

§ 74.1109 PROCEDURES APPLICABLE TO PETITIONS FOR WAIVER OF THE RULES, ADDITIONAL OR DIFFERENT REQUIREMENTS AND RULINGS ON COMPLAINTS OR DISPUTES

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within 30 days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within 20 days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument,

evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within 10 days and reply comments within 7 days thereafter. The Commission will expedite its consideration of the question of temporary relief.

III. Part 91 is amended as follows:

1. In section 91.557, paragraphs (a) and (b) are amended to read as follows, and a new paragraph (i) is added as follows:

§ 91.557 DEFINITIONS

As used in §§ 91.559 and 91.561:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" means any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

* * * * * * *

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

2. In section 91.559, paragraphs (a), (b)(3), (c), (e), and (f) are amended; paragraphs (g)(4) and (h) are added; and the note to section 91.559 is deleted:

§ 91.559 AUTHORIZATIONS FOR OPERATIONAL FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS * * *

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* * * *

* * * * * * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the cable whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

* * * * * * * *

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of any of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

* * * * * * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

3. Section 91.561 is amended to read as follows:

§ 91.561 NOTIFICATION BY APPLICANT

An application for any authorization subject to § 91.559 shall contain a statement that the applicant has notified the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system(s) served or to be served operate or will operate, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or

[NOTE.—Appendix C contains the pertinent rules as subsequently amended by Memorandum Opinion and Order released April 21, 1966 (31 F.R. 6313).]

permittees and educational interests. The notice shall include the fact of intended filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

NOTE.—As used in § 91.561, the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent from the action asserting jurisdiction over community antenna systems. In my opinion, the Communications Act does not now confer such jurisdiction and the Commission is without authority to promulgate these rules.

I believe that we should seek legislation to resolve the basic considerations in this matter. Since the real concern surrounding CATV appears to be its possible evolution into pay-TV, I propose an amendment of the Communications Act to preclude community antenna systems from distributing programs other than those received from transmissions of broadcast stations.

I am opposed to the rule's impediments on entry of community antenna systems into the top 100 markets, and specification of the grade B contour, rather than the grade A or lesser contour, as the benchmark for requiring carriage of local TV stations.

STATEMENT OF COMMISSIONER KENNETH A. COX, CONCURRING IN PART, DISSENTING IN PART

I concur in the steps the majority has taken, but must dissent to its failure to take other measures which I believe to be critically important. I think we are, indeed, at a crossroads in the development of our television system—and I gravely fear that the majority has taken a wrong turn.

The Commission has had a sorry record with respect to CATV. In the early 1950's when questions were first raised about CATV, the Commission's staff recommended that the agency assert and exercise jurisdiction over this new phenomenon.[1] However, the Commission of that day, not recognizing the potential impact of widespread CATV development, procrastinated and finally declined to assert general jurisdiction. At first, the consequences of that decision were not readily apparent—and were largely confined to small television markets where CATV, in most cases, performed its true supplemental function. Later the impact of CATV competition assumed more serious proportions, and the Commission began to shake off its lethargy. In the *Carter Mountain* case[2] it denied an application for microwave facilities to serve CATV systems in Wyoming on the ground that the increased competition to a small market television station which would have resulted might have impaired its ability to continue to serve its audience. It indicated that it would grant the applications on conditions designed to protect the station by requiring

[1] See Television Inquiry, hearings before the Committee on Interstate and Foreign Commerce, U.S. Senate, 85th Cong., pt. 6, p. 3490 *et seq.*

[2] *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963).

that the CATV systems carry the local station without degradation of its signal and without duplicating its programs.

Then last April, after more than 2 years of consideration of voluminous comments and special studies by the Commission and the broadcast and CATV industries, we adopted minimal rules with respect to microwave-fed CATV systems and proposed to extend them to off-the-air systems as well. It seemed to me—as I'm sure it did to broadcasters who had become increasingly alarmed by the explosive growth of CATV and its extension into larger and well-served markets—that the Commission had finally taken hold of the problem, 14 years late, but in time to prevent serious damage to the fabric of our television service. The Commission was divided four to two, but the majority, after considering and carefully laying out the unfair competitive impact of noncarriage of local stations or duplication of their programs, adopted rules which I think would have gone far toward preserving the system so painfully developed in this country—and promoting its further growth in the UHF. These rules would neither have destroyed existing CATV systems, nor deprived their subscribers of any programs. Similarly, they would not have blocked all future CATV development, but would simply have moved toward insuring that cable systems perform the valuable supplemental service for which they were originally devised. A reading of our first report and order in dockets Nos. 14895 and 15233, 38 F.C.C. 683, with its careful analysis of competition between broadcast stations and CATV systems—with particular emphasis upon the program exclusivity obtained in the market by broadcasters and its importance to their operations—gives one the clear impression that the majority was concerned first and foremost with the preservation and expansion of our over-the-air television system. While it recognized the important service CATV systems can supply to their subscribers, it insisted that CATV was secondary and subordinate in rank, and should therefore be subjected to quite modest restrictions to favor the primary service.

But now, less than a year later, the tone is different. In the report and order now issued—and even more in the deliberations leading up to the decisions reflected there—there has been a shift in emphasis. There is a subtly heightened importance assigned to the diversity of choice which cable systems provide to *some* television homes,[3] with a corresponding depreciation of the local service of area stations. There are expressions of concern that we not block the "new" technology of wired television—though the alternative of wired versus broadcast distribution has long been with us, both in radio and television, and it seems to me that CATV's technology, like its programing, is derivative and much less exciting in its possibilites than the over-the-air mode. And there is a tendency to downgrade program exclusivity—which seemed so important last April—and to forget the unfair competitive impact on broadcast operations of the CATV

[3] As indicated below, I think this is largely due to the vociferous protests, instigated by misleading publicity efforts of certain elements of the CATV industry, of these cable subscribers. While they are a small percentage of the television homes in this country—and usually a minority even in the television markets where they are concentrated—they are still numerous enough to have flooded Congress and the Commission with protests against actions which they were told we were about to take, but which were always exaggerated and sometimes completely false.

practices which we then undertook to regulate. The shift is most obvious in the reduction in the degree of nonduplication protection which is now to be afforded local broadcasters.

Why this change in attitude? I suppose it could be argued that my colleagues who now feel that same-day nonduplication is more in the public interest than the 15 days before and after local broadcast which we specified last April were simply uninformed when they took that action, and therefore made a mistake. They do not advance this explanation, and I am sure it was not true. In fact, they gave much more careful attention to consideration of the details of broadcast and CATV operation last year than they did on this round of discussions.

It would be more normal for such a change in position to be explained in terms of new information which has come to our attention for the first time since our action of last year. This may be the basis for what I regard as drastic impairment of the protection which we then decided should be given to the exclusive program rights a local broadcaster has acquired in the program market—but, if so, it has not been explained to me in these terms. I cannot claim that I have read all the comments in this voluminous proceeding, but in those I was able to examine—drawn from both broadcaster and CATV filings—and in the analysis of all the major comments prepared by our staff, I find no new factual data, and no new arguments, bearing on this issue which satisfactorily explain or justify the abandonment of the 15-day standard previously adopted. And, as suggested above, none of my colleagues have marshaled arguments which they have drawn from the comments to rationalize this new approach. Instead they talk vaguely of balancing interests and minimizing disruption for the subscribers of existing systems not yet subject to the rules, and of the importance of making network programs available to these subscribers on the day they are presented by the networks. If the last of these considerations is so important it seems strange to me that for years we have knowingly permitted television stations to delay network programs for the far more numerous over-the-air audience. Why has no one ever proposed a rule to prohibit this nefarious practice!

The fact is, of course, that except for certain live programs having an element of timeliness—all of which were excluded from the benefits of delayed nonduplication, and are almost never delayed in practice—there is no real urgency about seeing a particular program on a particular day or at a particular time. There may be an element of convenience, but it is one of the disadvantages of the television medium that the viewer must try to adjust his schedule to fit the times someone else—at a network or a local station—has selected for the presentation of his favorite programs, and can change at will. It *is* important that as many network programs as possible be made available in each market. But as I shall point out below, the nonduplication rule now adopted seems to me to be based on the concept that it is better that the cable subscribers, who are a minority, be able to see every network show on its day of origination than that they be furnished every such show, but with some of them delayed for a short period in order to make more of the most popular shows available to *everyone* in the market, nonsubscriber and subscriber alike.

I would like to discuss in detail the discussion, in the first report and order in the microwave dockets, of the period of nonduplication protection to be required, but time does not permit it. Certainly this was one of the longest and most carefully reasoned sections in the document, occupying nine pages in the printed report (see pars. 101 to 127). I find the explanation now offered for abandoning the result there reached so insubstantial as to be shocking. Consider what the majority says in paragraphs 51 to 56. They start by saying that simultaneous nonduplication is clearly called for—which is hardly startling since even NCTA concedes this. It then notes that in the first report we further determined that "some measure of protection beyond simultaneous nonduplication would also serve the public interest on a number of grounds." I think that sets some sort of record for delicate understatement. After carefully considering the data accumulated in over 2 years, we explicitly found that *15-day* nonduplication, before and after local broadcast, was reasonably necessary to achieve fair competition and preserve the local broadcasters' hard-won program exclusivity.

Now the majority say they have reconsidered and made a different balance, "in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public." Well, that was certainly thoroughly understood in April 1965, when we proposed to extend the microwave rules to the off-the-air systems, and to apply them to microwave service being provided under grants made prior to December 1963. That was the object of the exercise! Why the sudden announcement—as if discovered for the first time—that compliance with the rules "would tend to substantially disrupt the viewing habits of the CATV subscribers." While I don't think the "disruption" is so great as is suggested, and am satisfied that the subscribers would soon become accustomed to the new schedules, certainly we knew a year ago that *some* change would be effected by the rules—otherwise why go to the bother of adopting them. All we have learned since then is that, by the application of some misleading publicity techniques, several hundred thousand subscribers were frightened into sending protests—usually form letters or cards thoughtfully supplied by the CATV operator—to the Commission or the Congress. While I am no more anxious to face the wrath of an aroused public than anyone else, I think some hazard of that kind is involved in making judgments designed to serve the overall public interest but which injure or offend some part of the public. Furthermore, I think it could be demonstrated to the people concerned that their fears were exaggerated—and that in a rather short time they would adjust to the few scheduling changes which would actually be involved.

In other words, I agree that we should avoid *unnecessary* disruption of established viewing habits, but not that we should do so "as much as possible"—which to the majority apparently means that such concern for established, if fleeting, habits of a very small part of the television audience should shape national television policy, not just for them but for all future subscribers of all future systems as well. The majority says it seeks to preserve "the valuable public contribu-

tion of CATV in providing wider access to nationwide programing." I agree that far, but not that there is any necessity for insuring a wider selection of programs on any particular day for a favored few, when I believe it will deprive others of the opportunity, otherwise available, to see certain programs at all. The basic objective of permitting CATV systems to provide greater access to network programs can be fully achieved, as was pointed out in the first report, under 15-day nonduplication.

The majority then blandly announces that "balancing all the pertinent considerations," they think nonduplication should be cut to the same day for existing systems. I don't know what they balanced, since all they have discussed is the danger that some CATV subscribers—certainly not all of them—would have been required to view some network programs—certainly not all of them—at the times they are broadcast by the local station or stations rather than at the time the cable system would otherwise have brought the programs in from distant stations. The only argument then advanced in favor of this result is that it will eliminate the great bulk of delayed nonduplication requests, citing paragraph 125 of the first report. I think this is an argument for the opposite result! Paragraph 125 read as follows:

> 125. There remains the question of the precise extent of the restrictions to be imposed upon nonsimultaneous duplication. After examining this question carefully, we believe that the 15-day before-and-after period proposed in our last notice should be adopted. In dealing with network programs, our sample week study shows that, of all the hours of delayed network broadcasts, 10.2 percent were delayed less than 1 day, 48.9 percent were delayed from 1 to 7 days, 30.2 percent were delayed 8 to 15 days, and 10.7 percent were delayed over 15 days. A more detailed distribution shows that the number of hours of delayed network broadcasts fell off sharply at the end of a 7-day period of delay and once again at the end of a 15-day period.

Thus our study showed that 79.1 percent of delayed network broadcasts were delayed from 1 to 15 days, *and this was used as a principal justification for the 15-day protection adopted.* Now it is argued that reducing the protection to the same day is good because it avoids dealing with the problem the rule was designed to handle in the first place! The majority notes, "as an incidental benefit," that this will also "substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules." Quite so—but this is achieved by cutting the heart out of this part of the rules and reducing the rights of the broadcasters to such a low level that their opportunities for causing "disputes" are very slight. What seems odd to me is that we achieve this happy accommodation by favoring the party to this prospective "dispute" whom the first report found to be engaged in unfair competition in the area of program duplication, to the disadvantage of the party whose program rights the rules were designed to protect.

The majority then concedes that its concern about disruption as a result of 15-day nonduplication would not apply to new systems going into service hereafter. Thus even if we must defer to the private interests of a relatively few people in not having their viewing habits modified in the slightest, it is clear that the more effective protection of the

policy adopted in the first report could be applied to new systems since their subscribers would have no established viewing patterns. But the majority does not even adhere to policy in this partial fashion. They say that even here there would be disruption because the subscriber may not be able to view programs from distant stations at the times specified in his TV guide. They are so solicitous of the future subscriber that, again, they completely overlook the interests of the nonsubscriber. What about the "disruption" suffered by the resident of a sparsely settled area who has no cable service, or the urban viewer who can't afford such service, and who read in this same unspecified TV guide[4] of programs carried on distant stations on the cable but which are not available to them on the local station(s), though they would have been if the local broadcaster's first-run rights had been adequately protected? There has been a lot of talk that the Commission's regulation of CATV operations would make second class citizens of cable viewers. It seems to me that the majority has gone overboard in the other direction by shaping policy to accord a ridiculous degree of importance to these people's assumed interests. It's hard for me to weep for the cable subscriber who is going to receive more stations—though probably no more real services—than the people of New York City but who, we are now told, must not only have this wealth of program choice but must also have every program available to him the same day it is made available to viewers in New York.

I would like to expand upon the impact I think this curtailed protection will have on the nonsubscriber. In one- and two-station markets the local broadcaster tries to put together the best possible schedule for his viewers, drawing on more than one network. Since conflicts are almost inevitable between the more popular programs of the competing networks, this has customarily meant that most of the programs are presented at the time of network feed, if the station is interconnected, but some are broadcast on a delayed basis. While some CATV interests have sought to denigrate this practice by calling it "cherry picking," it seems clear to me that it has served—and would continue to serve—the public interest by making available in markets with less than three stations the best of the offerings of all three networks. And delayed broadcasting serves the public even in a three-station market, by permitting the local affiliate to rearrange the network schedule, to the limited degree his network and its advertisers will permit, in order to present a service which he thinks is more in the interest of his local audience. I think such local flexibility is in the public interest and should be preserved. A couple of years ago the Commission abolished option time and struck down CBS's incentive compensation plan because, in part, they impaired the local station's independence in reaching decisions as to clearance for programs offered it by its network. I think the clear result of the restricted nonduplication protection now being afforded will be to impel every station located in a three-station market and carried on CATV systems serving a substantial percentage of its audience to clear live for all the network shows it plans to pre-

[4] Certainly if 15-day protection were afforded the CATV operator would not publicize locally any programs he could be required to delete, but would tell his subscribers when they could watch the programs on the cable on the *local* station.

sent. I do not think this straightjacketing of the local broadcaster is desirable.

I think the impact will be even greater in markets with one or two stations. To the extent they now delay network programs—which 15-day nonduplication was specifically designed to protect—I think such stations have been providing a service to their audiences. I think they will now be sharply restricted in their ability to continue this service—if not totally precluded from doing so. As long as only a small part of their audience is served by cable systems, they can probably continue to present programs on a delayed basis even though some of their potential viewers will have seen the program a short time earlier. But if and when cable subscribers become a really significant factor in the market—and such operations are expanding at a rapid pace—then the broadcaster will not, I think, be able to continue to present programs selected from more than one network. It will be difficult enough to compete with the current offerings of a substantial number of distant stations—probably located in a larger market—without trying to do so with a program which a third, a half, or more of the local station's audience have already had an opportunity to watch. The majority, in paragraph 51, tries to shore up its argument about "disruption" as to new systems by saying that it is because of such concerns that some broadcasters, although entitled to 15-day protection, have requested only simultaneous nonduplication. In paragraph 116 of the first report we stated that NCTA had shown "a few instances" of such concessions by broadcasters, but did not regard this as of decisional importance. In the cases I know of where broadcasters who were entitled to *no* protection under the rules were able to bargain for simultaneous nonduplication, the result has been that they present no delayed programs, or at most one or two.

The majority seeks to support its refusal to give greater nonduplication protection as to new CATV systems by arguing that it is obviously preferable to have one set of rules for all systems. Of course I would prefer that, too, though I think the single rule should provide for 15-day protection. But we quite often adopt tightened rules which would bear harshly on existing operations, and in most cases we handle the problem by grandfathering the situations which have already developed and applying the new rule prospectively. That is exactly what we could do here—and should do since my colleagues are unwilling to inconvenience the subscribers of existing cable systems. This is common governmental practice, and often involves much more substantial discriminations than would be the case here.

The majority then turns to the question whether it should retain 15-day nonduplication protection for nonnetwork programing. It decides not to do so for the surprising reason that it afforded minimal protection at best. In other words, having given very restricted nonduplication protection to nonnetwork programs out of concern for CATV systems (see par. 123, first report), the Commission now withdraws even that effort to insure the local station of a small fraction of the program exclusivity for which it has bargained. Why, then, did we make this provision last April, when we knew as much about this aspect of the matter as we do now? I agree that 15 days is no enough,

and am satisfied that we will do serious damage to the present method of program distribution unless we give the broadcaster at least protection of his right to be the first to present each program he purchases for his market. The majority says it has determined that we must look elsewhere if we are to achieve effective relief in this respect. This refers to some extension of the concept of permission to rebroadcast to cable operations. I think that this requires legislation, which may take a long time—and in any event I do not think it will necessarily provide the protection the majority seems to be seeking—though not very aggressively. The legislative proposal we have submitted to Congress calls attention to the problem but makes no specific recommendation. In paragraph 152(iii) the majority concedes that they are not in a position to state whether a section 325(a) approach would be effective and fully consistent with the public interest. That being the case, I do not think they are in a position to abandon the only protection now given the broadcaster—minimal though it is.

The majority drops an interesting footnote to paragraph 55, in which it says that same-day nonduplication affords "substantial" protection to the most popular network programing so that "*most* network affiliated stations should be viable." [Emphasis supplied.] It must be encouraging to broadcasters faced with serious and growing CATV competition to know that the majority thinks that not too many of them will go under—with loss not only to the businessmen concerned, but also to the local audiences they serve.

In paragraph 56 the majority concedes that conflicting public considerations are presented—though they have carefully avoided mentioning a single factor favoring retention of 15-day protection—and conclude that their resolution constitutes a fair compromise. I fail to see much evidence of this alleged balancing of competing interests. It seems to me that zeal to avoid at all costs any disruption to existing cable subscribers has carried the day. I don't think this matter was really in issue at this stage of the proceeding. We did indicate that we wanted comments as to policy with respect to duplication of programs broadcast by the local station in black and white but available in color on a distant station on the cable. The parties duly addressed themselves to this question. But as to the extent of nonduplication protection, I think the general understanding was that we had reached a careful decision of this issue last April in adopting the microwave rules, and that if we adhered to our tentative conclusion as to jurisdiction over all CATV, there would be no change in this provision of the rules unless (1) experience with the microwave rules uncovered flaws, or (2) someone demonstrated that off-the-air systems are so different that these rules could not appropriately be carried over to them. I know of no evidence of the former, and no one seriously tried to establish the latter—not even the NCTA, which simply incorporated the arguments it made to Congress last May in an effort to show that certain stations had prospered without delayed nonduplication.

But without any such showing of a need for change in the comments filed in the proceeding, the majority has abandoned the position it developed so carefully last year. I suppose this simply proves the power of the pen when wielded by thousands of indignant members

of the public—even when they have been intentionally misled into writing in the first place. I think this provides an interesting—though rather depressing—chapter for students of the administrative process.

I agree that same-day nonduplication takes care of the time zone differential problem, but that's about all that it does over and above simultaneous nonduplication which NCTA was willing to concede months ago. The majority says it will afford the station affiliated with more than one network "some leeway" in presenting the most attractive programs of each, but then indicates just how much leeway the broadcaster has by reminding him that he must present it the same day the network did and that prime-time programs must be broadcast entirely within prime time. It may be that he can shoehorn in a few programs on this basis, though I believe it will require some changes in policy by some of the networks—and will certainly involve added expense for the station. Thus if it has been delaying network programs through the use of film, it would have to buy a videotape machine—and that's no small expense item, especially if he has to be able to handle color in order to be entitled to protection. Further, unless the network in question provides him an advance feed, he will have to have two loops into his studio, one for the live broadcast going out over the air and the other to feed the tape machine with a program coming in at the same time from another network. Since one- and two-station markets are usually small, this may pose serious problems for the broadcaster, and he may simply throw up his hands and carry the full schedule of a single network to avoid trouble and expense. If he does, the public will lose by it—and so will he, in terms of lowered average audience. I much prefer the greater flexibility permitted by the 15-day rule, and do not think the majority has even addressed themselves to this problem—much less assured themselves that what they speak of is feasible.

The majority inserts another footnote at this point, noting that the amount of delayed network broadcasting in the median one- or two-station markets is about 5½ hours and 11 hours per week, respectively. They cite paragraph 108 of the first report, which also shows that in one-station markets the range was from ½ to 23½ hours, and in two-station markets, from 1 to 42½ hours. So when they concede that the median is not insignificant and that there will be some detriment to the public if the local station curtails delayed broadcasts, they must also recognize that for half the markets involved (84 one-station and 57 two-station) the impact will be more severe. Nonetheless, they console themselves with the thought that the amount of delayed broadcasts is not too large in the median market. But what puzzles me is that it was unwillingness to "disrupt" established viewing patterns as to these very same programs which led them to cut back on nonduplication protection. If they worry about showing these 5½ or 11 hours of programing at later times to CATV subscribers, why are they so nonchalant about the risk that the equal, or greater, number of nonsubscribers may lose all, or a substantial part, of that programing? I would think that any sensible balancing of equities here would favor the nonsubscribers.

The other area of my disagreement with the majority concerns their treatment of the major market, distant stations issue. Since they will do no more, I support what they have done. However, I would have favored a broader rule—which I am sure that would be easier to administer than the policy of multiple petitions, waiver requests, and hearings to which we are now committed.

Certain of the broadcast entities filing comments in this proceeding urged us to exercise our authority under section 303(h) of the act "to establish areas or zones to be served by any stations." It was variously suggested that this be done by limiting CATV systems to carriage of stations providing a specified signal over the communities in which they are located, or by specifying a maximum mileage beyond which no station's signal should be extended. This is clearly an aspect of our responsibility for allocations—an area in which even critics of the Commission concede our authority, and in fact recognize that the agency was created primarily and specifically for this purpose. We have thus far exercised this authority in television by establishing a carefully designed table of channel allocations and by fixing maximum limits on heights and powers. While there are many situations in which deficiencies in service can and should be corrected by supplemental means such as CATV, satellites, and translators, I do not believe that any of these auxiliary services should be permitted to disrupt the basic television system that Congress, the Commission, and the broadcasters have worked so hard to establish.

It is precisely because one of these supplemental services, CATV, has taken a new and unexpected course that we are involved in this proceeding. I think its explosive development poses a threat of disruption to our television broadcast system, and that this is therefore the time to take hold of the problems presented and to fit cable operations into an appropriate place in the overall television structure. While the majority has undertaken to deal with part of these problems, I think it is not doing so in allocations terms and will, as a result, be unable to deal with the situation soundly, consistently, and expeditiously.

The majority contents itself with saying that CATV entrepreneurs seeking to bring distant signals—that is, signals carried beyond the originating stations' grade B contours—into the top 100 television markets will be required to demonstrate, in an evidentiary hearing, that they will not impair UHF development there or serve as a springboard to pay-TV. I would greatly prefer an approach which would bar new systems—for a 5-year period which would allow time for UHF growth and, perhaps, resolution of the copyright question—from extending any station's signal beyond its grade B contour, except upon authorization by the Commission in certain carefully defined situations. For example, I think we should permit greater extension of service by CATV systems where they carry signals into communities not receiving three network service over the air. But without some such limitation which would stem the proliferation of cable systems in areas already receiving substantial television service, I am afraid that CATV will stunt future growth of our free television system, and perhaps even impair the viability of some of the stations now serving the public.

Even assuming that we should employ the majority's hearing procedure, instead of a rule which I think might be sounder legally and certainly simpler to manage, I would not cut it off at the top 100 markets. While it is true that much current UHF activity is centered in these major markets, and that the risk of CATV becoming pay-TV on the basis of signals appropriated from the broadcasters is greatest there, I think there are compelling reasons for treating the smaller markets in the same way.

It seems to me that the majority's concerns about economic impact and fair competition apply with even greater force in these smaller markets. Certainly many of the more than 130 stations in these markets are marginal operations, and therefore much less able to withstand duplication of their programs and fragmentation of their audiences than the more profitable stations in larger cities. I therefore do not think it is logical to subject them to greater exposure to CATV competition than the stations in major markets, which may well be the effect of the majority's different treatment of the smaller markets.

One ground for this cutoff at the 100th market given by the majority is the fact that any delay incidental to the hearing procedures required is mitigated by the fact that the major markets generally have a considerable amount of service now, plus the prospects of new service. However, most of the markets from 75 to 100 have not more than 3 existing stations, while 20 markets below 100 also have 3 or 4 stations. It is true that the larger the market, the greater the likelihood that someone will be interested in building a fourth station. However, there has been interest in UHF stations to provide a fourth service in markets as far down as the 93d, and it seems likely that if favorable conditions can be maintained, in due course such developments can be expected in still smaller markets. Similarly, there should eventually be interest in putting third stations on the air in the 34 small 2-station markets. Beyond that, the Commission has made many allocations of single UHF channels to medium sized communities, and is presently proposing a class of low-power community stations to serve many more even smaller communities. Unless all these plans are to fail, the purposes of Congress in enacting the all-channel legislation to be frustrated, and this country to be left with a stunted television system, our regulation of CATV operations must channel their growth in ways which will not add to the problems facing upcoming UHF stations.

While the majority's proposal does not exclude the smaller markets from all relief, it at the very least raises procedural difficulties which I think impose unreasonable burdens on the very stations least able to bear them. In the first place, they must initiate the proceeding to consider the role of CATV in their market, while in the top 100 markets this burden is upon the CATV applicants. Then it seems to be suggested that different presumptions apply here, or that the burden of proof is shifted to the broadcaster, whereas in the larger markets it is on the CATV operator. It seems to me that in *all* markets the burden should be upon the CATV interests to demonstrate that their projected operations will not damage or destroy local broadcast service.

Of critical importance, of course, is what happens while the Commission is pondering these cases. In the major markets, presumably CATV activity must halt until we approve their entry. In the smaller markets, however, they can go ahead unless and until we act favorably on a request for stay.

Furthermore, the majority makes clear that in the top 100 markets private agreements between broadcasters and cable operators, though to be given weight, will not be controlling. However, this proviso apparently does not apply below the 100th market, and I'm afraid some broadcasters or prospective broadcasters in the smaller markets, faced with the added burdens outlined above, may try to work out arrangements whereby they will acquire partial interests in the CATV systems proposed for their areas in return, in part at least, for not instituting procedures to protest the CATV developments. While this may, to some degree at least, solve their personal financial problems, I am not sure it will adequately protect the public's interest in its available and potential free broadcast service. I certainly hope the small broadcasters will not take this course, but under the majority's procedures CATV can spread unchecked in these small markets unless someone—a broadcaster or a prospective applicant—goes to the trouble and expense of filing a protest.

One final thing concerns me about this different treatment of the smaller markets—I am afraid it will undercut our policy in the top 100 markets. If we permit the signals of the New York City independents to be put on CATV systems in smaller markets scattered around the country in areas falling between major markets, it seems to me this will create pressures to relax our policies so that the same service can be offered there. In paragraph 54 the majority justifies its failure to continue 15-day nonduplication as to new CATV systems by saying it would be anomalous to have different rules applicable to propose here. If they think that cable subscribers would object to mere delay in presenting programs that people in neighboring towns can see on the day of network release, what do they expect to happen when people in the top 100 markets find that they cannot get a service available to residents in smaller towns all around them?

The only way to deal realistically with this problem is to impose limits on the distance to which signals can be carried. I would treat all communities receiving usable services of the three networks alike, and require a showing in every case before permitting institution or extension of CATV operations employing distant signals.

Separate Statement of Commissioner Lee Loevinger re Second Report and Order in CATV Proceedings

I concur in the substantive provisions of the order but I cannot join in the opinion or agree that the Commission has the jurisdiction which it now asserts.

The opinion (here called "second report") which purports to support the present order seems to me to illustrate many of the worst aspects of the institutional decision. The opinion does not really rationalize or justify the result reached, but rather accepts it some-

236-331 O—66——10

what grudgingly. This is a product of the fact that the opinion was originally drafted by the staff to support an entirely different result. Despite the efforts and instructions of the Commission, and a series of revised drafts, the instant opinion is substantially similar to the document which was written to support a different result. The opinion refers to little evidence and much of that is inconsistent, assumptions and speculation substitute for facts, the reasoning is circuitous and illogical, and the statement is so turgid and prolix that it does more to obscure than illuminate the subject. I can concur fully only in paragraphs 97, 98, 150, and 156 to the extent of my concurrence in the order.

What the Commission is doing in the instant order is to exercise its quasi-legislative powers. Consequently the decision to issue or join in the instant order is a legislative judgment. I concur in the substantive provisions of the order not because I think it is wholly logical or the best method of dealing with the subject, but because it seems to me to be the best and most reasonable proposal that has any practical chance of securing approval by a majority of the Commission. This is, in my opinion, a legitimate basis for making a legislative judgment.

On the other hand, the assertion of jurisdiction is a legal matter that requires a legal judgment. Nothing has appeared or occurred since the previous Commission statement on this subject that furnishes any basis for reaching a different conclusion as to jurisdiction than the one set forth in my prior opinion. (38 FCC 683, 746 (1965).) Accordingly I adhere to that opinion and to the conclusions stated there.

The Commission rule requiring a hearing before CATV is permitted to commence operation in any of the 100 largest markets is particularly questionable. The ostensible justification is that CATV might become pay-TV. This reason is flimsy, since that danger—if it is a danger—could be met much more easily by less burdensome requirements.

Nevertheless the substantive position now adopted by a majority of the Commission seems to me to be the most moderate and reasonable compromise of sharply conflicting views and positions that has any practical chance of approval. It is of the greatest importance that the Commission now recognizes the necessity of requesting Congress to legislate on jurisdiction and other important aspects of this matter, and has done so. In these circumstances, I think the most constructive and useful course is to support affirmative action by the Commission, leaving the jurisdictional issue to decision by Congress and the courts, and looking to Congress for further guidance as to regulatory matters. Accordingly I concur in the substantive provisions of the legislative rules now promulgated by the Commission.

[This document is not part of the certified record in this case but all parties agree that it should be included in this Appendix for the Court's convenience.]

FCC 66-456

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SUBPART L, PART 91, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE BUSINESS RADIO SERVICE FOR MICROWAVE STATIONS TO RELAY TELEVISION SIGNALS TO COMMUNITY ANTENNA SYSTEMS	Docket No. 14895
AMENDMENT OF SUBPART I, PART 21, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE FOR MICROWAVE STATIONS USED TO RELAY TELEVISION BROADCAST SIGNALS TO COMMUNITY ANTENNA TELEVISION SYSTEMS	Docket No. 15233
AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS	Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766)

MEMORANDUM OPINION AND ORDER

(Adopted May 25, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER ABSENT.

1. The Commission has before it for consideration seven petitions for stay of the effective dates of the second report and order in dockets Nos. 14895, 15233, and 15971, 31 F.R. 4540, 2 FCC 2d 725, filed by: (1) Cox Broadcasting Corp. and Cox Cablevision Corp.; (2) Cosmos Broadcasting Corp. and Cosmos Cablevision Corp.; (3) Television Communications Corp.; (4) Columbus Broadcasting Co., Inc., and Chattahooche Valley CATV, Inc.; (5) Buckeye Cablevision, Inc.; (6) Newhouse Broadcasting Corp., New-Channels Corp., Delhi Video, Inc., Cabletron, Inc., and Cablevision Co. of Anniston; and (7) the Jerrold Corp., Jerrold Electronics Corp., Ottawa TV Cable Co., Inc., Streator TV Cable Co., Inc., Logansport TV Cable Co., Inc., Pontiac TV Cable Co., Inc., Greater Lafayette TV Cable Co., Inc., Florida TV Cable Inc., Amsterdam TV Cable Co., Gloversville TV Cable Co., Inc., Johnstown TV Cable Co., Inc., Mohican TV Cable Corp., Alpine Cable Television, Inc., Alice Cable Television Corp., McAllen Cable Television Corp., and Perfect TV, Inc. Petitioners request the Commission to stay enforcement of the rules promulgated in the second report until resolu-

tion of their concurrently filed petitions for reconsideration and until final adjudication of appeals from the second report or action by Congress, whichever should occur first.[1]

2. In support of their requests for stay, petitioners assert generally, without specific factual detail, that their interests and those of their subscribers will be immediately and irreparably adversely affected unless a stay is granted because petitioners may be forced to delete certain signals from their existing CATV systems, be denied the right to carry certain signals on proposed CATV systems, and may lose considerable funds expended in connection with present and proposed CATV investments, all of which will injure the public's reception of multiple television signals. It is further alleged that substantial legal questions are raised by petitioners' petitions for reconsideration with respect to the Commission's assertion of jurisdiction and the manner in which the rules were implemented. In view of the highly contested nature of the Commission's jurisdictional and other actions, the pending court appeals from the second report and the likelihood of further appeals, petitioners assert that the Commission should stay the effectiveness of the rules pending a decision on the several petitions for reconsideration and/or on the several appeals already filed and to be subsequently filed, or until final determination by the Congress of legislative proposals in this field.

A. THE CARRIAGE AND NONDUPLICATION RULES

3. Although petitioners seek a stay of the effectiveness of all the rules promulgated in the second report and order, their petitions for reconsideration do not challenge the substantive provisions of the carriage and nonduplication rules. Apart from asserting generally that jurisdiction is lacking and that evidentiary hearing or oral testimony was required, petitioners direct their contentions primarily toward section 74.1107 of the rules governing distant signals in major markets.

4. A preliminary examination of the petitions for reconsideration does not disclose any substantial likelihood that petitioners will prevail on merits of their jurisdictional argument. The petitions merely reiterate contentions which we have already considered and rejected in the second report (2 FCC 2d at 728–734, 793–797). Nothing new has been presented to alter our conviction that "the case for present jurisdiction is a strong one" (2 FCC 2d at 733).

5. Nor are petitioners likely to prevail on the merits of their argument that promulgation of the rules on the basis of the rulemaking proceeding, without conducting a full evidentiary hearing or hearing oral argument, was violative of due process. As petitioners concede, the Administrative Procedure Act does not require oral testimony or oral argument in rulemaking proceedings. The due process requirement of the fifth amendment "is not technical"; "argument may be oral

[1] Except for Buckeye Cablevision, Inc., petitioners make identical points in their petitions for stay and reconsideration and request the same relief. Buckeye seeks a stay of enforcement of the rules and the cease and desist proceedings in docket No. 16551, as to Buckeye, pending final orders determining the validity of such rules, the related enforcement proceedings against it, and its petition for waiver. (file No. CATV 100–5).

or written," so long as there is a "hearing in a substantial sense." *Morgan* v. *United States*, 298 U.S. 468, 481; *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710; *F.C.C.* v. *WJR*, 337 U.S. 265. Petitioners do not point to any evidence or argument which they have been precluded from adducing. All interested persons were accorded a full opportunity to present factual material and policy arguments in written form and to reply to the comments of others before the rules were promulgated.

6. We concluded in part I of the second report that a general evidentiary hearing on the carriage and nonduplication rules would serve no useful purpose (2 FCC 2d at 744). Moreover, the top 100 markets procedure adopted in section 74.1107 does accord the persons affected a full evidentiary hearing "in the context of the particular request and the particular situation," a procedure which we considered better suited to promote the public interest than a hearing of an overall nature (2 FCC 2d at 782). And provision has been made in section 74.1109 for evidentiary hearing, where appropriate, in individual situations involving the applicability of the carriage and nonduplication rules and in other appropriate situations not coming under the mandatory hearing requirement in section 74.1107(a).[2]

7. Petitioners have also failed to show that a stay of the effectiveness of the carriage and nonduplication rules is necessary to preserve them or the public from irreparable injury. We concluded in the first and second reports that these provisions generally are necessary to protect the public interest and "need impose no substantial burden on the ordinary CATV operator or his subscribers." First report and order in dockets Nos. 14895 and 15233, 38 FCC 683, 713–715; second report, 2 FCC 2d at 735–737, 747–749. The ad hoc procedures in section 74.1109 afford an adequate avenue for obtaining appropriate relief in individual situations. Indeed, the rules were not made effective as to existing off-the-air systems for an additional 60-day period to facilitate requests for waiver, our aim being to "allow an orderly transition period for the relatively small number of systems with limited channel capacity whose viability might be jeopardized by immediate application of the rules, or where existing service to CATV subscribers would be unduly disrupted" (second report, 2 FCC 2d at 768, 789). See also, memorandum opinion and order in docket No. 15971, issued on April 21, 1966, FCC 66–354.[3] We emphasized that "we intend to make every effort, consistent with the public interest, to avoid disrupting existing service to the public in applying the car-

[2] While the notice of inquiry and notice of proposed rulemaking (1 FCC 2d 453, 477) indicated that the Commission may specify oral argument or oral testimony after study of the comments, it also provided a shorter time for comments on pt. I and par. 50 of the rulemaking and stated that "the Commission may well spin-off portions of the rulemaking for early decision, since other portions may require lengthy consideration." We specifically stated that we would "reach an early determination" on par. 50 (1 FCC 2d at 472). In light of the comments on pt. I and par. 50, the urgent need for prompt action in the public interest, and our disposition of these aspects, we decided against oral procedures on the spun-off portions. However, further oral or written procedures may be specified on those portions of docket No. 15971 which were not resolved in the second report (see pars. 51–64 of the notice).

[3] Where a petition for waiver of the carriage provisions is filed on or before June 17, 1966, or within 15 days after any subsequent request for carriage, the system need not carry the station pending the Commission's ruling on the petition. See sec. 74.1109(h) of the rules.

riage provisions of the rules to systems now in operation" (second report, 2 FCC 2d at 753–754).

8. In light of the foregoing, we conclude that the public interest would be served by denial of the request for stay insofar as the general effectiveness of the carriage and nonduplication rules are concerned. Petitioners have given no indication of their individual circumstances in their petitions for stay nor have they petitioned for waiver.[4] However, if hardship circumstances exist, petitioners' proper course is to pursue their available administrative remedy.

B. SECTION 74.1107

9. The petitions for reconsideration are principally directed toward section 74.1107 of the rules. This section prohibits any CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets (as ranked by American Research Bureau on the basis of net weekly circulation for the most recent year) from extending the signal of a television broadcast station beyond the grade B contour of that station except upon a showing, made in evidentiary hearing and approved by the Commission, that such extension would be consistent with the public interest and specifically the establishment and healthy maintenance of television broadcast service in the area. The mandatory hearing requirement does not apply to service being supplied by a CATV system to its subscribers on February 15, 1966, the date on which the Commission issued a public notice announcing that such a rule was being adopted (FCC public notice 79927). Section 74.1107 was made effective upon publication in the Federal Register on March 17, 1966, pursuant to the Commission's finding that good cause existed for immediate effectiveness (second report, par. 147; sec. 4(c) of the Administrative Procedure Act).

10. Petitioners claim that good cause has not been shown for making the rule effective on publication in the Federal Register. They further assert that the rule by its terms is retroactive, arbitrary, and unlawful in its application because the February 15, 1966, grandfathering date is geared to our public notice of February 15, 1966, which was not published in the Federal Register. In addition, petitioners urge that the notice of inquiry and notice of proposed rulemaking in docket No. 15971 (30 F.R. 6078) did not afford specific notice of the grandfather date or of the substantive provisions of section 74.1107.

11. We believe it important to point up the issues presented. The first issue is whether there should be grandfathering and if so, the nature of such grandfathering. A second, and related, issue is whether good cause existed for making the rule effective upon publication in the Federal Register. We shall discuss these issues in turn and then treat the question of appropriate notice under the Administrative Procedure Act.

12. *The grandfather issue.*—In the second report we found that serious questions are presented as to "whether CATV operations in

[4] Petitioners Buckeye and Gramos Cablevision Corp. have filed petitions for waiver of sec. 74.1107, but not of sec. 74.1103.

major [television] markets may be of such a nature or significance as to have an adverse economic impact on the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature" and as to "the relationship, if any, of proposed CATV operations on large markets and the development of pay-TV in those markets" (second report, 2 FCC 2d at 781, 770–781).[5] We concluded that it is essential to examine such CATV operations before they become established or well entrenched (2 FCC at 782). We pointed out that such a procedure accords with the basic policy of the Communications Act to resolve important public interest questions before consequences possibly adverse to the public interest develop (ibid.). The crucial consideration was that unless the statutory policy is followed in this instance, any adverse consequences to the public would be irreparable. For, as we stated (2 FCC 2d at 782): "Once entrenched, it is difficult, if not wholly impracticable in light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest."

13. We found, therefore, that there are important public interest questions to be resolved in these major market situations. Since that is so, we could have simply made our rule applicable upon its effective date to all CATV systems, without any grandfathering; or, as urged by some of the commenting parties, we might have grandfathered only those systems which commenced operation to their subscribers before April 23, 1965 (the date of issuance of our notice of proposed rulemaking in docket No. 15971). The difficulty with such approaches, in our judgment, was the very substantial disruption to the CATV viewing public which could result from requiring a cessation of distant signal service in major markets significantly after CATV service had been initiated. Some appropriate form of grandfathering was therefore in order. Here again we might have chosen a date such as January 1, 1966, on the ground that there might not be too much disruption since systems which commenced operation after that date would not ordinarily have a great number of subscribers. Instead, we determined to take an approach even more liberal to the CATV industry, and adopted the February 15 grandfather date—the date on which the Commission reached informal agreement on its general policy in this area. There was widespread interest in our discussion, both in Congress and in the industries involved, and we therefore publicly announced the overall course we had determined upon.

14. There is thus no question of retroactivity, as urged by petitioners. The rules were made effective on March 17, and affected the operation of systems as of that date—not before. The real issue put forth by petitioners in this respect is not retroactivity but that the Commission should have grandfathered all systems as they were operating on March 17—the effective date of the rules (and the date of publication

[5] We need not repeat here the detailed discussion in the first and second reports as to the injury to the public if UHF should fail a second time or as to the inability of CATV adequately to replace the lost service. See second report, 2 FCC 2d at 735–736, 774–775; notice of inquiry and notice of proposed rulemaking in docket No. 15971, 1 FCC 2d 453, 468–471; first report, 38 FCC 683, 699–701; *Carroll Broadcasting Co.* v. *F.C.C.*, 228 F. 2d 440 (C.A.D.C.).

in the Federal Register). But, in our judgment, there are sound reasons militating against such a course.

15. Because of the rapid pace of CATV growth, even a postponement of several weeks might have irrevocably changed the existing situation to a substantial degree. As set forth in the second report (2 FCC 2d at 771):

> * * * CATV growth has been explosive and gives every indication of continuing its phenomenal spurt. In 1959, there were about 550 CATV systems, in 1965 at the time of the first report, there were about 1,300 CATV systems, and today—less than a year later—it is estimated that there are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, there are 1,026 CATV franchises which have been recently granted but are not yet operating (ibid.). The number of applications for franchises is even larger—an estimated 1,958.

It is now estimated that in the first 3 months of 1966, the period of issuance of the February 15 notice and the second report, the number of operating systems increased to 1,629 and the number of franchises not yet operating to 1,207 (Television Digest, Apr. 4, 1966, CATV addenda, p. 1). We have also been advised by American Telephone & Telegraph Co. that Bell System associated companies have effective tariffs in 37 States to furnish facilities to CATV systems which may or may not require local franchise authorization. Bell has 26 systems under construction, 50 firm orders, and over 300 letters of intent.

16. It is highly likely that a great number of the proposed systems not yet in operation are located within the grade A service contours of stations in the top 100 markets and would bring in distant signals. For, whereas existing CATV service has been largely confined to smaller markets lacking three full network services, the CATV industry has shifted its attention to the larger communities and these are the "centers of the most intense CATV development now" (second report, 2 FCC 2d at 772, 740–742). Since February 15, new operations have commenced or expanded into apparently new geographic areas in the vicinity of, or within, the cities of Toledo, San Diego, Cleveland, and Buffalo.[6]

17. Of particular concern in our decision to adopt the February 15 grandfathering date is the tendency of some business entrepreneurs to make extraordinary efforts to commence operations before an announced deferred deadline which will confer grandfather rights. If the effective date of section 74.1107 had been postponed until 30 days after publication and the grandfathering line had been drawn either at that point or at the publication date, it is likely that many of the 1,207 franchised systems not yet in operation would have made extraordinary efforts to commence service to a token number of subscribers before the deadline, in order to be in a possible position to expand throughout the entire community without undergoing the hearing which we have found required by the public interest. It is reported, for example, in the April 4, 1966, edition of Cable Television Review (p. 3) that in Toledo, petitioner Buckeye, who is challenging the validity of the February 15 grandfathering date, "raced the clock prior to the March 16 FCC report and order deadline, and was deliver-

[6] These operations are presently the subject of Commission inquiry pursuant to sec. 74.1107 or sec. 74.1109 of the rules, or sec. 312(b) of the Communications Act.

ing signals to 52 homes 8 hours before the 17th" (opposition of Storer Broadcasting Co. to petition for stay, p. 3).

18. Thus, the effect of grandfathering on the basis of the publication date or 30 days thereafter would have undoubtedly been an all-out effort to beat the deadline, and therefore a significant additional number of systems in operation in the top 100 markets. We have set out in the second report (par. 149) the difficult practical questions that may be raised in attempting to draw a line in the community to halt the expansion of a new system. See section 74.1107(d). It would clearly not serve the public interest to foster the development of a situation where the system just commences operation and we then attempt to act as quickly as possible to halt growth. We would be promoting disruption to the public and a chaotic situation, rather than orderly consideration of the important public interest questions raised prior to the commencement of service—the thrust of our major market, distant signals policy. In short, we simply do not believe that in a situation of rapid change we are precluded from taking immediate action to stay, pending hearing, the commencement of new operations which could be seriously detrimental to the public interest and which by the act of coming into being might preclude effective remedial action by the Commission—at least without substantial disruption to the public. Sound public interest considerations therefore existed for drawing the grandfathering line at February 15. We stress again that selection of this date was less stringent action than an earlier cutoff, and was designed to minimize any disruption in existing service to the CATV segment of the viewing public, while at the same time affording necessary protection against possible irreparable injury to the public interest from a pell-mell scramble for commencement of new operations in major markets during a hiatus:

19. Complaint concerning the lack of publication in the Federal Register of the public notice of February 15, 1966, misses the point. That notice did not constitute Commission action and did not require any action or course of conduct by CATV systems. It simply announced, inter alia, the grandfathering date that had been decided upon in the Commission deliberations and which was to be incorporated in the regulations which were still to be issued. A party who commenced new distant signal operations in major markets during the period between February 15 and March 17, 1966, when section 74.1107 became effective upon publication in the Federal Register, was not in violation of the rule during that period or subject to any sanction. All that the rule requires is that distant signal operations commenced after February 15 be suspended on and after March 17, 1966, pending the requisite hearing on the merits. In short, whatever the grandfathering date selected—April 23, 1965, as urged by some, January 1, 1966, or February 15—there was no legal requirement for immediate announcement of the date and immediate publication in the Federal Register. What was legally required was publication of the rule, with its grandfathering date, in the Federal Register, and this of course was done.

20. As a practical matter, we point out that we did announce in the public notice of February 15, 1966, the consensus which had developed in our meetings, both as to carriage and nonduplication requirements

and the major market, distant signals policy (including the February 15 grandfathering date). That notice, while not published in the Federal Register, was unusually well-publicized.[7] Significantly, none of the petitioners assert that they were unaware of the February 15 grandfathering date, and it would strain credulity if they were.[8]

21. *Good cause for effectiveness upon publication.*—Having determined upon a grandfathering date earlier than the date of publication in the Federal Register, good cause existed for making the rule (sec. 74.1107) effective upon publication in the Federal Register. We could have followed normal procedure and waited until 30 days after publication in the Federal Register to proceed against systems commencing distant signal operation in the top 100 markets after February 15, 1966, and continuing after the effective date. But this would not have served any useful purpose or the public interest. Since grandfathering is pegged to the February 15 date, orderly procedure and the desirability of avoiding disruption as much as possible called for prompt Commission action against any system commencing operation after that date in violation of the rules, rather than the Commission waiting passively on the sidelines for the 30-day period to expire. Here again, this would be true whether the grandfathering date was February 15 or some earlier date.[9]

22. *The issue of appropriate notice.*—Our action was not taken without adequate prior notice to potential CATV operators and local franchising authorities. The notice of inquiry and notice of proposed rulemaking in docket No. 15971, issued on April 23, 1965, and published in the Federal Register (30 F.R. 6078), put all persons on legal notice that the Commission might take action of a substantially similar nature. We set forth at some length the subject and issues involved in CATV operations "in areas with potential for independent stations," pointing out that: "Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programing sources because of overshadowing by three network services from nearby communities" (notice, 1 FCC 2d 453, at 471). In order to be "in a position to take definitive action," we specifically invited comment on a proposed rule to "prohibit the extension of the signal of any television station beyond its grade B contour into a community" located in such areas "without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community" (1 FCC 2d at 472). Further, we

[7] For 2 or 3 weeks just before the notice was issued the Commission had received a flood of letters and telephone calls from members of the public and Congress on behalf of constituents, which reflected widespread knowledge in the CATV industry that the Commission was about to act in this proceeding. On Feb. 15, the day the notice was issued, the Commission held a press conference on the notice, which was well-attended by members of the press and other interested persons in the industries involved. The provisions of the notice were widely reported both by the general press and by the trade press. On Feb. 15 and within the next few days the Commission distributed almost 5,000 copies of the notice to persons who requested copies or otherwise inquired as to the status of the proceeding.

[8] The National Community Television Association's newsletter of Feb. 18, 1966, sent to all the members of the association, which include petitioners, discussed in great detail the Commission's public notice, referred specifically to the Feb. 15 grandfathering date, and attached the text of the notice.

[9] Similarly, had we decided upon a later grandfathering date such as the date of publication in the Federal Register, the foregoing discussion in pars. 13–21 would be pertinent and would constitute good cause for immediate effectiveness of the sec. 74.1107 upon publication.

indicated that this aspect of the proceeding might be spun-off for early determination (pars. 50, 67, 1 FCC 2d at 472, 477).

23. We also invited "counterproposals as to possible alternative measures" and requested comments on "the proposals of petitioners" (1 FCC 2d at 476). The proposals of the rulemaking petitioners, which were described in the notice (1 FCC 2d at 454–463), included requests that the Commission: "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to serve other areas except upon prior consent of the Commission" (1 FCC 2d at 457); "stay immediately the commencement of operations by CATV's in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final rules to this effect," for the asserted reason that "once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas" because the "practical and legal difficulties * * * in attempting to reverse this situation would be virtually insurmountable" (1 FCC 2d at 462); "stay * * * microwave grants for CATV use" pending the adoption of a rule which would "permit a signal to be carried by CATV only if the community is located within a prescribed signal contour of the station carried, or is closer than a specified distance from the station," suggested to be "the grade B contour of the station carried, or a distance of 80–90 miles" (1 FCC 2d at 463, footnote 11); and "put on notice all persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation, and that some CATV systems may be required to modify or cut back their operations" (1 FCC 2d at 463).

24. As a further matter, the counterproposals which were submitted in the comments (and to which all parties were given an opportunity to respond) went directly to these matters. We have summarized these comments on paragraph 50 and the proposals made therein in the appendix B to the second report (see 31 F.R. 4565–4566), and will not repeat them here. The proposals of the American Broadcasting Co. (ABC), Westinghouse Broadcasting Co., Association of Maximum Service Telecasters (AMST), Midwest Television, Inc., and others clearly dealt with paragraph 50 of the notice and with the rules finally adopted.[10]

[10] Thus, ABC urged "the adoption of a rule prohibiting any person from transporting the signal of a TV station beyond its grade B contour into a community within the range of four or more commercial grade A assignments and receiving grade A or better service from three or more commercial TV stations, stating that such a rule would apply basically to all but three of the Nation's top 100 markets * * *" (id. at p. 4566). AMST proposed the rule "that no CATV system shall be permitted to extend the signal of any television broadcast station beyond its grade B contour except upon a clear and full showing * * * that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service in the area." AMST also urged that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after Apr. 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rulemaking. It stated that an alternative would be to apply the rule to all CATV systems operating on the date of publication of the rule which thereafter substantially expand their lines or the number of their subscribers or which increase the number of stations carried (ibid.).

25. We stressed the factor of "notice" in the notice itself, so that persons proposing to operate CATV systems and franchising authorities would take account of the pending rulemaking in planning their future actions. We stated (1 FCC 2d at 477): "We believe it appropriate, as requested by one of the petitioners, to put all persons who now operate or propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." We concluded the portion of the notice dealing with proposed Commission action on CATV in major markets and overshadowed areas by stating (1 FCC 2d 472): "Finally, we believe that franchising authorities will give due regard to the fact that the matter is thus under Commission consideration."

26. There is no unusual variance between the proposals made in the notice and the provisions of section 74.1107. The requirement for evidentiary hearing merely sets forth the procedure for making the showing proposed in the notice. The use of the 100 largest television markets, as ranked by ARB, delineates the "areas with potential for independent stations"; with a few minor exceptions these markets constitute the "areas with four or more commercial channel assignments."[11] The use of the grade A contour, which was suggested by several parties to the proceeding (second report, 2 FCC 2d at 791, 792), is a reasonable means of identifying not only "overshadowed" areas but also the area where CATV operations might have the severest impact on UHF stations in major markets (second report, footnote 63, 2 FCC 2d at 783). The questions of "effective date" and "grandfathering" were implicit components of the course of action proposed by the notice, which expressly noted and called for comments on the petitioners' requests for an immediate stay on the commencement of new operations pending determination of the merits because the "practical and legal difficulties" in subsequently "attempting to reverse the situation would be virtually insurmountable" (1 FCC 2d at 462, 476). As a further matter, the proposals or counterproposals submitted by the parties (par. 24 above) are also pertinent, although we think reliance upon them is unnecessary. See *Owensboro-on-the-air* v. *F.C.C.*, 262 F. 2d 702 (C.A.D.C.), cert. den. 360 U.S. 911. Accordingly, the promulgation of section 74.1107 was preceded by sufficient legal notice within the meaning of section 4(a) of the Administrative Procedure Act.

27. *Conclusion.*—Unlike the ordinary request for stay which seeks to preserve the status quo pending the outcome of a determination on the merits, a grant of the stay relief sought by petitioners would permit them and untold other CATV systems to irrevocably alter the status quo. Apart from petitioner Buckeye, it is not alleged that any of the

[11] ARB market rankings are widely used by the television industry and have been used by the Commission in other rulemaking proceedings. See, e.g., notice of proposed rulemaking and memorandum opinion and order in docket No. 16068, 30 F.R. 8166; public notice No. 60894, Dec. 18, 1964. The fifth report and memorandum opinion and order in docket No. 14229, 2 FCC 2d 527, promulgating a revised table of UHF television channel assignments, summarized the assignments made in the top 100 markets, as ranked by ARB, as follows (2 FCC 2d at 551): "Thus, with minor exceptions, the top 25 markets have 6 or more unreserved assignments; the 26th to 75th markets have 5 or more unreserved assignments; the 76th to 100th markets have 4 or more unreserved assignments; and the 101st to 150th markets have 3 or more unreserved assignments." See also, fourth report and order in dockets Nos. 14229 et al., 30 F.R. 7711.

petitioners commenced new distant signal service in the top 100 markets between February 15 and March 17, or to date. Rather, petitioners seek a stay of section 74.1107 in order to commence new service which is not now being provided to subscribers. For the very reasons which led us to select the February 15 grandfathering date and to make section 74.1107 effective upon publication, it follows a fortiori that a stay would be unwarranted and contrary to the public interest. Indeed, in view of the much longer time period involved, the potential irreparable injury to the public would be magnified many times. By completion of the judicial review process, the operating systems in the 100 top markets would be too numerous and extensive to allow meaningful protection of the public interest through section 74.1107 even if its validity is sustained, as we believe it will be.

28. Petitioners have not shown any substantial likelihood of prevailing on the merits of their petitions for reconsideration. Nor have they shown any irreparable injury to themselves which would outweigh the public injury in the grant of a stay. It is asserted that considerable sums have been invested in obtaining franchises, preoperational expenses, and construction of system plants; that pole attachment rights from local utilities are affected and may be lost, as well as funds due on outstanding contractual commitments for plant equipment, performance bonds, etc.; and that franchise rights may be lost for failure to construct within time limits. But section 74.1107 does not preclude, or require a hearing for, construction or the commencement of operations limited to local signals or any other service not involving the carriage of distant broadcast signals. Nor does the section flatly prohibit the carriage of distant signals; it provides rather that "Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in full evidentiary hearing, determines that the requisite showing has been made." Since petitioners may obtain relief upon conclusion of the hearing, the mere requirement for hearing does not cause irreparable injury. *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921, 925 (C.A.D.C.).[12] There may well be, of course, some loss of potential subscriber fees in the interim. However, in the circumstances we cannot regard private injury of this nature as sufficient to overcome the crucial possibility of substantial irreparable injury to the public.

29. Moreover, if application of the hearing requirement of section 74.1107 would be unduly inequitable or inappropriate in the unusual situation, a waiver can be sought. Petitioners point out that because of the distances between stations in some hyphenated markets, a station may be considered a distant signal in its own market. Or a system may be required to carry the grade B signals of VHF stations in a community but be precluded, without hearing, from carrying a low-

[12] If the franchises impose some time limit within which distant signals must be carried, petitioners have not shown that relief cannot be obtained from the franchising authorities for a delay occasioned by factors beyond their control. As noted in par. 25 above, our April 1965 notice expressly cautioned franchise authorities as to the possibility of Commission action in this area. The Federal regulation is, in any event, controlling.

powered UHF station in the same community.[13] There may be instances, of course, where a hearing is not necessary to protect the public interest and where strict application of the rule would produce anomalous results.[14] We think, nevertheless, that the criteria of section 74.1107 generally reach the situations of concern (see second report, pars. 118–127, 144; footnotes 54, 57; 2 FCC 2d at 772–777, 783). While exceptions may be made for good cause shown, this should be upon petition for waiver which will permit Commission consideration of the particular circumstances prior to the commencement of distant signal operations.

30. In sum, we think that the rules are valid and that the public interest requires that they be continued in effect. The rules cannot be simply ignored by persons who disagree or believe that an exception should be made in their instance. The proper procedure is to obtain a court stay of the effectiveness of the rules or a waiver from the Commission. Those who commence operation in violation of the rules, as a substitute for either procedure, do so at their own risk and will be responsible for any disruption to the public caused by the cease and desist and enforcement procedures which the Commission will be forced to pursue. Such operations will have to stop prior to Commission consideration of the merits and will not be taken into account in that consideration.[15]

31. In light of the foregoing, *It is ordered*, This 25th day of May 1966, that the petitions for stay *Are denied*.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. I would grant the petitioners' requests to stay the effectiveness of the Commission's CATV rules pending action on their petitions for reconsideration, until final adjudication of appeals from the second report and order, or action by Congress, whichever should occur first.

I disagree with the Commission's finding that there is little likelihood of petitioners' prevailing.

There are presently six bills pending in Congress with respect to regulation of CATV, H.R. 7715, H.R. 12914, H.R. 13286, H.R. 14201, H.R. 14454, and S. 3017. Hearings have been held on four of these

[13] We note, however, that the community of the VHF stations may be a separate major market, thus bringing into play the considerations discussed in footnote 60 of the second report, 2 FCC 2d at 786. In other words, protection of the public interest may necessitate some appropriate temporary relief as to the VHF signals rather than waiver of the rule to permit carriage of the UHF signal without hearing.

[14] We note that petitioners challenge the use of the predicted grade B contour as a measure of a distant signal. However, the use of propagation curves to measure television service contours is customary in Commission proceedings and has been judicially recognized as valid. *Wilton E. Hall and Greenville Television Co.* v. *F.C.C.*, 237 F. 2d 567, 573–575 (C.A.D.C.). Under the rules, the predicted grade B contour may be refuted by an adequate showing of the actual contour. The availability of signals through the use of ordinary home receiving equipment is entirely different, we believe, from the situation where signals would not be available to the public but for the use of highly sophisticated CATV equipment which may include a tall antenna structure placed on the highest elevation in the area. *Frank K. Spain d/b/a Microwave Service Co., Tupelo, Miss.*, 2 FCC 2d 905, 907–908. See also second report, footnote 65, 2 FCC 2d at 783.

[15] For these reasons, and those set forth in our order of Apr. 27, 1966, in docket No. 16551, Buckeye's petition for stay of the effectiveness of the rules pending final orders determining their validity and its petition for waiver (file No. CATV 100–3) will be denied. See also FCC 66–449 and FCC 66–455, adopted this day.

bills by the House Interstate and Foreign Commerce Committee (H.R. 7715, H.R. 12914, H.R. 13286, and H.R. 14201).

I believe it is unsound to second-guess the Congress, and now conclude that no changes will be made in the Commission's proposed bill, H.R. 13286. With substantive changes or enactment of a different bill, the Commission's present CATV rules could be nullified.

Moreover, in face of serious questions as to the Commission's having jurisdiction over CATV and validity of the rules recently promulgated, there is no certainty that the rules will be upheld in pending court appeals.

In my opinion, the Commission does not presently have jurisdiction over CATV and, consequently, the rules are invalid for this and other reasons set forth in my dissent to the Commission's decision in docket No. 16551, which dissent is incorporated herein by reference and attached hereto.

I vote to stay the effective date of the rules until their validity has been finally adjudicated by the courts or until Congress has enacted CATV legislation.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming, arguendo, that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication "except as otherwise provided by the agency upon good cause found and published with the rule."

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retrospectively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to pre-

vail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rulemaking without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

[This document is not part of the certified record in this case but all parties agree that it should be included in this Appendix for the Court's convenience.]

FCC 67-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SUBPART L, PART 91, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE BUSINESS RADIO SERVICE FOR MICROWAVE STATIONS TO RELAY TELEVISION SIGNALS TO COMMUNITY ANTENNA SYSTEMS	Docket No. 14895
AMENDMENT OF SUBPART I, PART 21, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE FOR MICROWAVE STATIONS USED TO RELAY TELEVISION BROADCAST SIGNALS TO COMMUNITY ANTENNA TELEVISION SYSTEMS	Docket No. 15233
AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS	Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766)
AMENDMENT OF SECTION 74.1103 REQUIREMENTS RELATING TO DISTRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS	RM 1017
AMENDMENT OF SECTION 74.1107(a) OF THE COMMISSION'S RULES AND REGULATIONS CARRIAGE OF DISTANT SIGNALS IN TOP 100 MARKETS	RM 1025

MEMORANDUM OPINION AND ORDER

(Adopted January 5, 1967)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER DISSENTING AND ISSUING STATEMENTS; COMMISSIONER COX CONCURRING IN THE RESULT AND ISSUING A SEPARATE STATEMENT; COMMISSIONER WADSWORTH ABSENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it a number of petitions for reconsideration of the *Second Report and Order*, issued in this proceeding on March 8, 1966 (31 F.R. 4540).[1] Except for some respects in which

[1] App. A contains a list of the parties who have filed petitions for reconsideration, or oppositions. Dismissal of the petition for reconsideration, filed by Courier Gable Co., Inc., is sought on the ground that it has not given good reason under sec. 1.106(i) of the rules for not participating in the proceeding at earlier stages. Because of our desire to be fully informed as to the views of all interested persons in rulemaking of this nature, we have considered the Courier petition and will deny the request for dismissal.

modification of the rules is sought, we have decided that the petitions should be denied. To a considerable extent, they raise no new issues and advance no new arguments for our consideration. We will not go over old ground again, but will limit this opinion to those matters which warrant additional treatment and to the modifications in the rules.

I

2. The contentions concerning the Commission's jurisdiction are essentially repetitive of arguments fully considered in our previous opinions.[2] We shall treat in greater detail the question of whether the rules are inconsistent with constitutional and statutory requirements of free speech. See, e.g., *Back Mountain Telecable, Inc.*, 5 F.C.C. 2d 735. Such inconsistency is urged on the ground that they interfere with the right to receive programs and direct the conduct of CATVs in deciding what programs shall and shall not be carried. Assuming that the provisions of section 326 of the Communications Act, 47 U.S.C. 326, are applicable to CATVs, we see no violation of either the first amendment or that statutory provision.

3. It is well established that reasonable regulation of radio transmissions, if consistent with the public interest as that term is defined taking into account the overall purposes and provisions of the act, is not violative of the right of free speech. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Lafayette Radio Electronics Corp.* v. *United States*, 345 F. 2d 278 (C.A. 2, 1965). This principle has been applied to the imposition of carriage and nonduplication restrictions on CATVs similar to those finally adopted in the *Second Report and Order*. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), cert. den. 375 U.S. 951; *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965).

4. While it is true that those cases dealt with radio licensing, we have now held that CATVs provide an extension of a broadcast service; see also *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 211, 217, 225 F. 2d 511, 517 (1955). If, as we believe, Congress has given us the regulatory authority we have asserted, there is no reason why the free speech principles should apply differently to those CATVs which derive their signals off-the-air than to those which use licensed radio.[3] The public-interest con-

[2] The contentions concerning the validity of the "grandfathering" date of Feb. 15, 1966, our decision to make the rules effective upon publication in the Federal Register, our failure to hold a full evidentiary hearing before promulgating the rules, and the general adequacy of notice of rulemaking have all been discussed in the memorandum opinion and order, released May 27, 1966, denying petitions for stay of the effective date of the rules, FCC 66-456, 3 F.C.C. 2d 816. It is contended further that sufficient notice was not given that "final" rules, rather than "interim" action pending a resolution of pt. II of the rulemaking, would be adopted for CATV operations in major markets. While the *Second Report* dealt only with pt. I and pars. 49 and 50, we examined the comments on pt. II and concluded that they added very little to the comments on pars. 49 and 50, certainly nothing which would permit us to adopt substantive rules resolving the policy issues in this area. We decided that evidentiary hearings were necessary and our major market procedure operates pending a resolution of the issues by this process rather than by the rulemaking process.

[3] See also *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y., decided May 23, 1966), explaining in detail why CATVs are not merely reception facilities and that they do transmit radio waves, albeit by wire.

siderations remain the same, as does the impact upon speech. We are not concerned here with the sort of "sweeping suppression of home subscription television" which was stricken down on free speech grounds in *Weaver* v. *Jordan*, 49 Cal. Reptr. 537, 411 P. 2d 289 (1966), but rather with limited regulation.

5. So far as our rules go beyond the original carriage and nonduplication requirements to prohibit extending certain signals beyond their grade B contour without a hearing, it can hardly be contended, in light of the existing authorities, that the right of free speech includes the right of a party subject to the act's jurisdiction (here an interstate communicator by wire) to extend the service area of a television station beyond the area authorized by the Commission, in a manner inconsistent with the public interest. Thus, the CATV system has no more constitutional right to extend the service area of a station in a manner inconsistent with the public interest than the station would have the constitutional right to increase its height and power in violation of our rules or the public interest. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); see sections 303(h) and 307(b) of the act.

6. One other contention on the question of the Commission's authority warrants brief discussion.[4] It is urged that the Commission cannot rely upon any of the radio licensing provisions of title III of the act, on the theory that they do not apply to wire transmissions but only authorize regulation of radio and television stations licensed under title III. This approach parallels the argument made, and rejected, in *Carter Mountain*, supra, that the Commission was applying "broadcast regulation" to common carriers.

7. The Communications Act does not so compartmentalize the Commission's functions. On the contrary, it created one agency "for the purpose of regulating interstate and foreign commerce in communication by wire and radio" by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communications * * *" (sec. 1, 47 U.S.C. 151). When a new development constitutes an extension of radio or television service, as CATV does, it is unrealistic to treat it as though it were totally unrelated.

8. Congress "* * * did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even

[4] We think no more than mention need be made of the contention that the rules deprive parties holding local franchises of property without compensation. Federal regulation of businesses engaged in interstate commerce is not subject to attack on that ground. *Nelson Brothers Bond & Mortgage Co.* v. *Federal Radio Commission*, 289 U.S. 266, 282. The contention that systems in operation prior to the issuance of the notice of proposed rulemaking have a constitutional right to be "grandfathered" is also patently without merit. Rules adopted after full rulemaking procedures may validly be applied to existing systems. We have, however, repeatedly indicated our intention to avoid undue disruption to the public in this connection.

in fields where the subject matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219-220. We cannot adopt a view of the act which would frustrate both the congressional intent and the more effective use of radio in the public interest.

II

9. We turn now to a discussion of the petitions as they bear upon the specific rules. Our discussion will treat in turn the aspects of: (1) Carriage, (2) nonduplication, (3) the major market, distant signals policy, and (4) procedure and miscellaneous changes.

1. CARRIAGE

10. *Satellites.*—The rules adopted in the *First Report* provided that where a CATV system operates within the grade B or higher priority contour of both a satellite station and its parent station, carriage of one would relieve the system of any obligation to carry the other. In light of contentions that satellites should be treated like any other station in accordance with the prescribed priorities, the rules adopted in the *Second Report* deleted this exception. It is now urged by petitioners that the amendment went too far, since substantial duplication of programing would result if the system is required to carry both the satellite and the parent stations. The rules will be amended to provide that where a system operates within the grade B or higher priority contour of a satellite and its parent station, the system need not carry both stations but shall carry the station having the higher priority and may select between stations of equal priority. This refinement retains the essential purpose of the earlier amendment and will, we think, better serve the public interest. Accordingly, sections 21.712(d)(4), 74.1033(b)(4), 74.1103(b)(4), and 91.559(b)(4) are added to the carriage provisions of the rules in the attached appendix B.

11. *The Grade B Contour.*—A CATV system is required, upon request, to carry the signal of a station which puts a grade B or better contour over any part of the community, unless the priority scheme set forth in section 74.1103 (a) and (b) requires an exception because of limited channel capacity. We also noted in the *Second Report* that "carriage will not be required where a sufficient showing (in a sec. 74.1109 petition) is made that a predicted signal is not in fact present in the community * * *" (footnote 40, par. 68). The Association of Maximum Service Telecasters (AMST) urges that a station should be carried, upon request, "everywhere in its predicted grade A contour, irrespective of its actual signal strength, as well as everywhere in its predicted grade B contour, subject to a showing of a different actual grade B contour * * *" (AMST petition for reconsideration, p. 14).[5]

[5] Several modifications urged by AMST simply renew requests previously considered in the *Second Report*. Nothing new has been presented to warrant further discussion here. Wichtex Radio & Television Co., Inc., asserts that CATV systems should not be permitted

12. We recognize that there are considerations favoring the use of the predicted grade B contour. Since the requirement for carriage of local stations, in a very real allocations sense, furthers our responsibility to prescribe the areas to be served by television broadcast stations (sec. 303(h)), the use of an allocations tool—the predicated grade B contour—might be appropriate.[6] Further, there are legislative developments which appear to tend in the direction of a definitive standard. See, e.g., House Report No. 2237 on H.R. 4347, 89th Congress, 2d session, pages 2, 81, 83. See also footnote 15, infra.

13. We further recognized in the *Second Report* that the outcome of the copyright matter could have a significant effect on our regulations in the CATV field (*Second Report*, 2 F.C.C. 2d at 768–769). However, the precise direction and extent of any appropriate regulatory changes cannot now be foreseen, as they will depend to a large extent upon the specifics of the copyright aspect which have not yet been definitively resolved. In the circumstances, and since the development of new propagation curves (docket No. 16004 (30 F.R. 6651)) and modernization of specifications for measurements are being explored, we do not think that the public interest would be served by changing the rules at this point. Accordingly, while the instances in which a waiver is warranted in accordance with footnote 40 of the *Second Report* are likely to be rare because of the substantial supporting showing required, we will continue to consider supplemental showings made as to actual contour as provided in section 73.684(f) of the rules. If the processing of such petitions for waiver should become an undue administrative burden or if any other pertinent change in circumstances occurs, we will, of course, reexamine the matter.

14. Moreover, in light of our ruling in *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798, 800, that carriage is required where any part of the community of the system falls within the pertinent contour, we will clarify the carriage provisions by making this construction explicit. The phrase "the system or the community of the system is located in whole or in part" will be substituted for the words "the system operates, in whole or in part" in sections 21.712(c), 74.1033(a), 74.1103(a), and 91.559(a). The phrase "in whole or in part," as used in the exclusivity provisions, is also to be construed so as to require exclusivity on a system operating in a community, part of which falls within the grade B or higher priority contour of a station. Thus, in the case of a system operating in an incorporated community, the

to alter or delete any portion of distant broadcast signals carried on the cable, or to substitute CATV-originated advertising. Apart from the fact that the nonduplication rules may require deletion of programs duplicating local signals, the subject of program origination by CATVs is included in the Commission's legislative recommendations and may be affected by the outcome of the copyright question. In this posture, we do not think it appropriate to consider the Wichtex request on the merits here.

[6] In view of the fact that signal strength at various distances from a television station varies with time, location, season, weather conditions, terrain, and other factors, the use of estimated contours is good for overall allocation purposes but presents problems when predicting the service from a particular station in a particular area. See sec. 73.683, report of the working group for the engineering conference, in docket No. 16004, on the development of new FM and TV propagation curves, dated Apr. 12, 1966. However, examination of the question of actual signal strength in the community or actual contours is necessarily minute and often futile, as it is very difficult to make a valid showing through measurements over a sufficiently wide area and a long enough period of time. Moreover, where a community comes within the predicted grade B contour of a station, the station's signal is normally readily available for reception by the sophisticated CATV equipment, utilizing as they do choice receiving sites.

question of carriage and nonduplication rights turns on whether any part of the community falls within the contour; in the case of a system in an unincorporated area where it may be difficult to delineate community boundaries (see discussion within, pars. 38–39), carriage questions will be resolved on the basis of whether the system itself is operating, in whole or in part, within the contour.

15. *Copyright.*—Finally, in view of our previous discussion on this point (par. 108, *Second Report*), we shall refer only briefly to copyright argument that has been advanced that in light of the district court's decision in the *United Artists* case,[7] systems should not be required to carry local signals unless afforded complete copyright immunity by the stations requesting carriage. As stated in paragraph 108, our rules are based on the present situation in which the CATV system operates without regard to copyright clearance. We again state that our actions should not be taken as in any way affecting the copyright suit. As to the above argument, the short answer is that it is up to the system to determine whether to follow the district court's decision or the present industry practice, but it cannot properly obtain a waiver of our carriage rules when it follows a selective policy in this respect (i.e., ignoring copyright in the case of distant signals and purporting to follow it as to local signals). We believe that in light of present industry practice, no revision of our rules is needed, and that we should, therefore, deal with any situations of this sort by waiver, when and if they arise. Generally, any revisions of our rules in this respect must await further developments.

16. A further question has arisen as to whether a local station can request carriage and at the same time reserve any rights which the station itself may have to proceed against the system for copyright infringement. We think that this would be manifestly unfair to the system and that in requesting carriage the station must confer such authorization as may be required from it, so long as the carriage request is outstanding. All that the station can properly reserve is the right to proceed against the system with respect to any programing which is carried after the system has been notified that the request for carriage has been revoked.

2. NONDUPLICATION PERIOD

17. The National Association of Broadcasters (NAB), AMST, and several individual broadcasters urge that the time period for nonduplication should be restored to 15 days before and after the local broadcast, as we originally provided in the *First Report*[8] (38 FCC 683). It is asserted that the present same-day nonduplication pro-

[7] *United Artists Television, Inc.* v. *Fortnightly Corporation*, 255 F. Supp. 177, S.D.N.Y., issued May 23, 1966.

[8] Some of the parties claim that the reduction to same-day nonduplication was made without prior legal notice. However, we stressed both in the *First Report* (38 F.C.C. 683, 686–687) and in the notice in docket No. 15971 (1 F.C.C. 2d 453, 465) that the conclusions of the *First Report* as to carriage and nonduplication were subject to reconsideration in the further proceeding. We repeatedly stated that the rules would not be applied to the CATV industry as a whole until we had had an opportunity to examine the overall subject of carriage and nonduplication in light of our further exploration in docket No. 15971. The proceedings in dockets Nos. 14895 and 15233 were not terminated by the *First Report*, but were instead held "open for final action in conjunction with our action upon the overall subject of carriage and nonduplication" (38 F.C.C. at 687). The length of the nonduplication period was very much at issue in the comments filed in the further proceeding. In the circumstances, we do not think that the claim of lack of notice is well taken.

vision is inadequate because delayed broadcasts occur most frequently in one- and two-station markets and the burden of seeking additional protection under the ad hoc procedures of the rules falls on those broadcasters least able to bear it. The NAB further states that the period for nonduplication of syndicated and film programing should be geared to the term of the contract between the local station and the film supplier. As a minimum, it urges, exclusivity should be afforded until after the first run of any particular program in a series or film package or for 1 year, whichever occurs earlier.[9]

18. Our decision to provide by rule for same-day nonduplication was made after full consideration of matters urged by petitioners, and constituted, in our judgment, a fair compromise of the competing interests pending a resolution of the status of CATV under the copyright law. *Second Report*, 2 F.C.C. 2d 725, 747–749, 768–769. Not only have no new arguments pertinent to the rule (as against individual situations more appropriate for waiver) been presented, but we would deem it inappropriate, for the reasons indicated in paragraph 13, to undertake a reexamination at this point when the important and relevant copyright considerations are in a state of flux. As already noted, since the *Second Report*, the district court decision in the *United Artists* case has been issued and is now on appeal in the Second Circuit. Moreover, the House Judiciary Committee has reported favorably on a copyright bill which would afford much more exclusivity protection than the provisions of our rules, if it were to be enacted. House Report No. 2237 on H.R. 4347, 89th Congress, 2d session, pages 81, 86–87. In the current circumstances, we adhere to our judgment that the public interest is served by our rule affording the local station exclusivity on the day of its broadcast of the program. If changes become appropriate upon a final resolution of the copyright matter or if revisions are needed upon the basis of our experience with this provision, we shall move promptly to implement such revisions.

19. A number of petitioners, both stations and CATV systems, have set forth their particular, individual circumstances as a basis for urging some change in sections 74.1103 and 74.1107 of the rules. While we see no reason to modify the rules in light of their contentions, this is not determinative of the question of whether petitioners could obtain affirmative relief or a waiver of the rules pursuant to a petition filed under section 74.1109. The ad hoc procedures are the appropriate vehicle for obtaining full consideration of individual situations.

20. There is, however, one unusual problem which we shall discuss because it may be common to several stations. WBEN, Inc., licensee of station WBEN-TV, Buffalo, N.Y., has filed a petition for rulemaking (RM–1017) to revise section 74.1103(f) to afford nonduplication protection for U.S. network programing which is presented by

[9] The Commission has also considered the recommendations of the Committee for the Full Development of All Channel Broadcasting, adopted at a meeting of its Executive Committee on Mar. 26, 1966. The committee's recommendations are to the effect that: (1) CATV systems should be required to make clear showing that they would not pose a substantial threat to the development of new and/or existing UHF stations, (2) the CATV rules should apply equally to all stations regardless of market size, and (3) the nonduplication period should be 15 days before and after the local broadcast. We believe that the spirit of the first recommendation is inherent in the *Second Report*, as well as in recent decisions on specific cases. The latter two recommendations have been rejected for the reasons stated herein (pars. 18, 23).

foreign stations prior to the day of its initial network presentation in the United States. WBEN states that during a typical week in March 1966 a total of 64 hours of network programing presented by Buffalo stations was duplicated by Canadian stations carried on the CATV system of Courier Cable Co. in Buffalo. The same-day nonduplication provision would enable the Buffalo stations to request exclusivity only as to 37½ hours. The remaining 26½ hours of duplicated network programing, being prior calendar-day duplication, would be beyond the purview of section 74.1103 of the rules. It is requested that section 74.1103(f) be amended to provide additionally that a CATV system shall, upon request of the local station, "refrain from presenting any network program proposed to be broadcast by such station from a foreign station at any time prior to the time of broadcast by such station where such program is released on the foreign station prior to the time of its initial presentation on a domestic network * * *." [10]

21. The problem does not appear sufficiently widespread to warrant the institution of rulemaking proceedings at this time, since it affects only those stations and CATV systems operating in the vicinity of the Canadian border. However, the *Second Report* states with respect to same-day nonduplication (2 F.C.C. 2d at 749):

> * * * we will consider requests by local stations and CATV systems for different treatment on an ad hoc basis, pursuant to the summary procedures discussed in paragraph 97 where possible, or by evidentiary hearing if necessary. Thus, the station which receives its network programing by mail, or the station or system which faces some other unusual problem, can bring its situation to our attention for such relief as may be appropriate in the individual circumstances and warranted by the public interest.

The Canadian prerelease problem presents the kind of unusual situation we had in mind. The rule is intended to provide exclusivity for network programing presented on the same day as the domestic live network presentation (2 F.C.C. 2d at 747, 749) and this consideration will be afforded substantial weight in ruling on any petition under section 74.1109 for the imposition of additional requirements necessary to achieve the basic purpose of the rule.

22. *Translators.*—In the *Second Report* we accorded fourth priority for purposes of carriage to commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power and provided for nonduplication protection against more distant signals. However, we excepted such translators from the carriage requirement where the system was carrying the signal of the originating station. A question has arisen as to whether the originating station is entitled to nonduplication protection if the system is located beyond the grade B contour of that station. In allowing this exception, the Commission intended that the originating station would have the same exclusivity as to programing to which the translator station would otherwise have been entitled, unless the originating station has higher priority rights of its own. The rules will be modified to make this clear in the attached appendix B (secs. 21.712(d)(3), 74.1033(b)(3), 74.1103(d)(3), and 91.559(b)(3)).

---

[10] Supporting comments were filed by Brockway Co., KMSO-TV, Inc., Mt. Mansfield Television, Inc., Maine Radio & Television Co. and WLBZ Television, Inc., Great Lakes Television Co., Channel 9 Syracuse, Inc., King Broadcasting Co., and Storer Broadcasting Co. Total Telecable, Inc., and Courier Cable Co. filed oppositions to which WBEN, Inc., replied.

3. DISTANT SIGNALS IN THE TOP 100 MARKETS

23. The bulk of the requests for reconsideration concern the rules governing distant signals in major markets. Section 74.1107 provides that no CATV system operating within the predicted grade A contour of a television station in the 100 largest television markets (as ranked by American Research Bureau on the basis of net weekly circulation) shall extend the signal of a television station beyond the grade B contour of the station, except upon a showing in a hearing that the operation will be consistent with the public interest and, particularly, the establishment and healthy maintenance of television broadcasting service in the area. The hearing requirement does not apply to distant signals which were being supplied to subscribers on February 15, 1966.

24. It is asserted by various broadcast interests that the question of distant signals should be governed by a substantive rule, rather than a hearing procedure, and that the rule should apply across the board to all markets. Both CATVs and broadcasters challenge the use of the grade A contour, claiming that the area encompassed is either too large or too small, and proposing the use of census urbanized areas, the grade B contour, or some standard based on mileage. Challenge is also made to the use of the grade B contour as the measure of a distant signal, some urging a mileage standard and others suggesting a test dependent on whether the signal is actually receivable off-the-air. It is further asserted that the 100 largest television markets should not be selected upon the basis of American Research Bureau (ARB) net weekly circulation figures, but rather upon some other criteria, such as population figures of the U.S. Census Bureau. And, finally, petitioners seek modification or clarification of the provisions of section 74.1107(d) concerning geographical extension into new areas by "grandfathered" systems which were providing distant signals to subscribers on February 15, 1966.

25. In general, we adhere to our determination in the *Second Report* that, in light of present conditions, the public-interest questions raised by proposed CATV entry into major markets are appropriate for consideration in evidentiary hearing. We also adhere to our decision to distinguish between major and smaller markets by drawing the line for required evidentiary hearing at the 100th market. Here, again, we would be reluctant to explore any fundamentally different approach while the copyright question is being actively considered by the Congress and the courts and before the outcome is known. However, in view of the contentions of the parties concerning the details of the rules, it appears that further discussion of some aspects is warranted.

26. *Use of ARB Market Rankings.*—We treat first the contention that the 100 largest television markets should not be selected upon the basis of ARB net weekly circulation figures, but rather upon population figures of the U.S. Census Bureau, either the standard metropolitan statistical area (SMSA) or urbanized area ranking. Petitioners note that ARB is a private firm whose working data are not public, and that the market ranking of a community on the basis of net weekly

circulation of the largest station may vary substantially from the community's ranking on the basis of census figures. They also point out that in some hyphenated markets the distances between communities included in the market may be so great that application of section 74.1107 would be inappropriate or produce anomalous results.

27. We gave consideration to the use of census rankings when we decided upon the ARB net weekly circulation figures (NWC). While none of the alternatives is entirely satisfactory, the ARB NWC market rankings appeared preferable for our purposes. The important factor from our standpoint is the size of the population which could be reached by a television station. The service area of a television station usually extends well beyond the metropolitan or urbanized area of the particular community to which the station is assigned. The SMSA or urbanized area ranking does not indicate whether the surrounding area to be served by a television station is sparsely populated or contains other communities which are separated by rural areas but which cumulatively have a sizable population. ARB NWC market rankings reflect TV homes in the entire area served by a television broadcast station and, thus, are a better measure of the potential audience which might attract new stations.

28. While it may be appropriate to use census rankings for some purposes, we are not required to do so merely because the Census Bureau is a governmental rather than a private organization. ARB NWC market rankings are well known and widely used by the television industry. They have been used by the Commission in other rulemaking proceedings. See, e.g., notice of proposed rulemaking and memorandum opinion and order No. 16068, 30 F.R. 8166; public notice No. 60894, December 18, 1964. Moreover, with minor exceptions it is the top 100 markets, as ranked by ARB, which have 4 or more unreserved channel assignments under the fifth report and memorandum opinion and order in docket No. 14229, 2 F.C.C. 2d 527, 551, and which, therefore, provide the opportunity for independent stations.[11]

29. On the whole, the ARB NWC market rankings adequately cover the areas of concern. While special problems may arise in some areas, such as hyphenated markets, we think it better to deal with these situations on an ad hoc basis under section 74.1109 rather than to adopt a different standard which might entail other problems.

30. *The Grade A Contour.*—We also adhere to our determination that the predicted grade A contour is, for purposes of the rule, an appropriate criterion for measuring the area within which the importation of distant signals raises public-interest questions. It does not include the much larger areas falling within the grade B contour, as requested by some of the petitioners for reconsideration. Nor is it limited to the immediate environs of the principal community, as sought by others. But the grade A contour generally carves out the essential area upon which UHF operations in the market would usu-

[11] We have also considered using some other ARB criteria, such as its ranking based on homes viewing all stations in the market during all quarter-hours in prime network time. However, the NWC ranking affords a better indication of population in the case of overshadowed areas where outside stations may affect the audience for local stations in the market, and we see no offsetting advantages in the use of the prime time ranking. The markets which would be excluded from the top 100 if prime time homes were used in place of NWC have considerably more UHF activity than those which would be substituted.

ally be based. We recognize that the grade A contour may encompass some localities where, because of the particular circumstances, an evidentiary hearing appears unnecessary. We have already granted waivers of the hearing requirement in some such instances.[12] No standard suggested to us would precisely fit all the situations we are seeking to reach, to the exclusion of all others. The use of the grade A contour, coupled with the procedures for waiver, insures that all proposed distant-signal CATV operations in the area of apparent reasonable concern are brought before us for consideration and such action as may be warranted in the public interest in the particular circumstances.

31. *The Grade B Contour as the Measure of a Distant Signal.*—It is urged, particularly by Entron, Inc., that the Commission should substitute a mileage standard, such as 80 miles, for the grade B contour as the measure of a distant signal.[13] Petitioners point out that grade B contours vary from station to station. Because of the differences in VHF and UHF contours, a CATV system may be required to carry VHF stations in a community but be precluded from carrying UHF stations in the same community.[14] Or a CATV system may be required to carry VHF stations in a more distant community but be precluded from carrying a UHF station in a closer community.

32. We think that the grade B contour is a reasonable demarcation between a distant and a local signal. See section 303(h) of the Communications Act. We regard this contour as generally delineating the area within which service from the station can reasonably be expected. The carriage requirements as an allocation principle are geared to the grade B contour in order that the station may have access to all persons within this general service area. Beyond this point the CATV system is, in a real sense, extending the service area of the station by markedly changing the quality of the signal being received, and raising public-interest questions which are not resolved as of this time.

33. While the Commission might conclude that the public interest would be served by permitting an extension without evidentiary hearing in some instances, the adoption of an across-the-board mileage standard like 80 miles would appear to go too far and give rise to other problems. For example, it would create a gap between the carriage requirements of the rules and the signals for which evidentiary hearing or waiver is required. It would also increase the likelihood that a CATV operating in one major market could carry the signals of stations located in another major market. We agree in principle that VHF and UHF stations located in the same community should be treated alike insofar as carriage on the CATV system is concerned. But if that community is a separate major market, car-

[12] See, e.g., *Martin County Cable Co., Inc.*, 4 F.C.C. 2d 348; *Coldwater Cablevision, Inc.*, 4 F.C.C. 2d 351; *Chenor Communications, Inc.*, 4 F.C.C. 2d 354.

[13] In asserting that the rules are broader than necessary to cover CATV distribution of New York or Los Angeles independent stations, Entron misconstrues the rationale of the *Second Report*. The New York and Los Angeles stations were used merely as examples. The Commission's concern is with distant signals generally in major markets.

[14] Jackson TV Cable Co. has filed a petition for rulemaking (RM 1025) to amend sec. 74.1107(a) to provide that a UHF station may be carried without hearing where a VHF station in the same community is carried. A supporting statement was filed by Jerrold Corp. For the reasons stated herein, par. 33, the petition will be denied. We note further that waivers have already been granted to permit the carriage of UHF signals in some instances. See, e.g., *Athens TV Cable Co., Inc.*, FCC 66–953, released Nov. 7, 1966.

riage of the VHF stations may present threshold public-interest questions for evidentiary hearing. See footnote 69 of the *Second Report* and footnote 13 of the memorandum opinion and order, released on May 27, 1966, denying the petitions for stay (3 F.C.C. 2d 816, 827). We have every intention of administering the rules so as to avoid anomalous results. However, we believe that the waiver procedure, which permits prior Commission consideration of all relevant factors in the particular situation, will better accomplish this end than basing the definition of distant signal on a mileage standard which is not correlative to the grade B contour.[15]

34. Nor do we find merit in the contentions that certain refinements in, or exceptions to, the grade B contour standard are called for in the rules. Courier Cable Co., Inc. (Courier), asserts that the definition of distant signals should exclude signals which are regularly received off-the-air by viewers residing beyond the grade B contour of the station. In the alternative, Courier urges that in locating the grade B contour, the use of maximum power and antenna height by the station should be assumed. But, what is involved is, to a considerable extent, an allocations question, particularly where account is taken of the manner in which CATV changes the quality of the more distant signal and thus equalizes its reception vis-a-vis the clearly local signal. See paragraph 32, above; cf. note 69, *Second Report*. Further, the delineation of actual service is a complex matter, requiring thorough substantiation. Where, therefore, a system in a community within the predicted grade A contour of stations located in the top 100 markets proposes to bring in the signal of a distant station (i.e., to extend a signal beyond its grade B contour), it should not be permitted to do so, on the ground that it is not extending a distant signal but rather only carrying a signal which is being regularly received in the community, unless it has substantiated this ground either in a waiver petition or in a hearing. Courier's further contention that maximum height and power be assumed in locating the grade B contour ignores the very practical policy considerations at which the major market, distant signals doctrine is aimed. It would mean that situations raising serious public-interest questions would not come within section 74.1107, and that the type of situation described in note 69 of the *Second Report* would be multiplied manyfold.

35. *New Geographical Areas.*—Clarification is sought as to the applicability of section 74.1107 (a) and (d) to geographical extensions by "grandfathered" systems in major markets. Subsection (d) of section 74.1107 exempts from the hearing requirement of subsection (a) distant signals which were being supplied to subscribers on February 15, 1966, except where there is "any new franchise or amendment of an existing franchise to operate or extend the operations of the CATV system in the same general area." Subsection (d) further

[15] We recognize that it might simplify matters for all concerned if we were to prescribe a single mileage standard, reasonably approximating an average grade B contour, for determining whether a signal is "local" or "distant" for purposes of the CATV rules. But we would not undertake such a step without further comment from interested persons or prior to the resolution of the proceedings in docket No. 16004 concerning propagation curves (30 F.R. 6651). While no such delay in this proceeding is warranted, we do not mean to preclude the possibility of future exploration of this question in a separate proceeding if that should prove appropriate.

provides that the system shall not extend its "grandfathered" distant signal service to "new geographical areas where the Commission, upon petition filed under section 74.1109 * * *, determines that the public interest would be served * * * by appropriate conditions limiting the geographical extension of the system to new areas."

36. AMST and Telerama, Inc., request clarification as to what kind of extensions, in the general area comprising a main community and its suburbs, fall within the required hearing provisions of subsection (a) and what extensions are exempt under subsection (d), subject only to consideration upon petition under section 74.1109. AMST asserts that the dichotomy between the two was not made clear in paragraph 149 of the *Second Report*, which seems to indicate that subsection (a) would apply to an extension from a suburb into the main community but is silent with respect to an extension from one suburb to another. AMST takes the position that in a city or suburb of any size, an extension from one part of the city or suburb to another part of the same city or suburb is clearly an expansion into new geographic areas which should come within section 74.1107(a). On the other hand, Telerama contends that subsection (a) "should not be directed to the situation where a system is operating in a part of a suburb of a main community and attempts to add subscribers in the suburban area in which the system was intended to serve and for which the technical facilities were engineered."

37. We have already clarified this aspect to some extent in declaratory rulings and cease and desist proceedings instituted since the *Second Report* to enforce the provisions of section 74.1107(a). *Letter of May 2, 1966, to Telerama, Inc.* (Cleveland, Ohio), FCC 66-397, 3 F.C.C. 2d 585; *Mission Cable TV, Inc., et al.* (San Diego, Calif.), FCC 66-548, 4 F.C.C. 2d 236. In the Cleveland matter, Telerama urged that since the communities it was proposing to serve, though separate governmental subdivisions of the suburban area of Cleveland, were within the geographic area the system was engineered to serve (an area having a 20-mile radius), the extension was governed by subsection (d). The Commission ruled that subsection (a) applied to extensions to separate incorporated communities, stating (3 F.C.C. 2d at 586):

> It is important to note that the exemption and the related geographical extensions provisions of subsection (d) are limited to the specific community (including such additions as unincorporated suburbs) within which the system was franchised (if that were the case) and was operating on February 15, 1966. The term system in the first sentence of subsection (d) means the system in the specific community and not one operating generally in the area. Thus, the discussion in paragraph 149 of the *Second Report* refers several times to a system operating in a community and the question of how to draw a line in the particular community [as to] * * * the appropriate geographical area or areas. Further, a contrary construction would undermine the basic purpose and thrust of the section; it would mean that a system which was supplying distant signals to its subscribers in one small community as of February 15, 1966, could, if it used the same headend, construct new systems in many other separate and distinct communities calling for new franchises (including, such as here, the principal community), without coming within the terms of subsection (a).

We believe that the above construction is the only logical one, and the only one comporting with the obvious intent and purpose of the rule.

Since, however, the matter is before us and a question has been raised, we shall clarify the rule by the addition of the phrase, "* * * in a community * * *" in section 74.1107(a). No such clarification is needed in subsection (b), since that subsection is already couched in terms of "community." We will also clarify the related portions of sections 74.1105 and 74.1107(d) by inserting appropriate references to the "same community" or "another community." [16]

38. The matter of unincorporated areas was considered in the *Mission Cable* case, 4 F.C.C. 2d 236. Mission, which has a franchise to construct and operate CATV systems in the unincorporated areas of San Diego County, urged that by reason of having commenced operations in one part of the county prior to February 15, 1966, it was entitled to the benefits of the "grandfathering" provision of subsection (d) of section 74.1107 for operations throughout the unincorporated areas of the county. While rejecting this broad view (4 F.C.C. 2d at 242), we also declined to rule that the mere existence of several housing developments or subdivisions with different names establishes that each subdivision is a separate and distinct community, within the contemplation of section 74.1107(a) (4 F.C.C. 2d at 240–241). The distinction drawn in *Mission Cable* turned on the presence or absence of substantial tracts of undeveloped land between subdivisions or other populated areas lacking clearly defined legal boundaries (4 F.C.C. 2d at 241, 242).

39. While there may be other situations where an area of proposed new operation is so clearly a separate and distinct community as to bring into play the provisions of section 74.1107(a), we shall not attempt to delineate further the scope of subsection (a) here. The difficulty of drawing lines within an incorporated community and of establishing the separate-community status of adjoining unincorporated areas not separated by undeveloped land was recognized in paragraph 149 of the *Second Report* and in *Mission Cable* (4 F.C.C. 2d at 240), as well as the desirability of avoiding artificial boundaries. In general, except where it would plainly undermine the basic purpose of subsection (a), the drawing of appropriate lines for extension into new geographic areas in the above situations calls for case-by-case judgment and will be considered only upon petition under section 74.1109.

4. MISCELLANEOUS AND PROCEDURE

40. *Annual Filing of Information.*—It is asserted that CATV operators should be required to file on an annual or periodic basis the information described in paragraph 99 of the *Second Report* (2 F.C.C. 2d at 765), for otherwise the information submitted may soon become obsolete and lose its usefulness. While the *Second Report* called for a single submission, we recognize that the regular filing of information by CATV operators may be desirable in this rapidly changing field, so that we or the Congress may take appropriate actions in the public interest. However, we prefer to postpone consideration of this question until we have examined the responses to

[16] In this connection, we also believe it appropriate to delete from sec. 74.1105 the reference to "systems which propose to extend lines into obviously new geographic areas."

our recent questionnaire. After we process the information submitted and gain more experience with the operation of the rules, we will be in a better position to determine whether regular filing is needed and whether any changes or additional information would be appropriate for filing on a regular basis.

41. *Procedural Changes and Clarifications.*—Some of the petitioners have sought clarification or amendment of the procedural provisions of the rules. And, in the course of administering the rules, it has become apparent that other changes would be desirable. Because the amendments adopted at this time relate to procedural matters and are designed to clarify the rules, notice and further rulemaking are not required. The changes and clarifications are indicated below.

42. First, in administering the rules we have discovered that in many instances additional copies of pleadings filed were needed for Commission processing. Also, in those instances where procedures were not specifically provided for in part 74 of the rules, there has been some confusion as to the filing of pleadings and reply pleadings. In order to obviate these difficulties, we are amending section 74.11 of the rules so as to add a cross reference to subpart A of part 1 of the rules, "General Rules of Practice and Procedure."

43. Second, there appears to be a fairly widespread misconception that notice under section 74.1105 need not be given with respect to proposed service coming within the provisions of section 74.1107. This misconception may arise from the fact that section 74.1107(b) does not require service of a request for evidentiary hearing but provides instead for public notice by the Commission. The notice requirement in section 74.1105 applies to all proposed service, whether or not section 74.1107 is involved. In order to clarify this matter, section 74.1107(b) will be amended to require a statement that copies of the notices given pursuant to section 74.1105 have been filed with the Commission.

44. Entron, Inc., has requested that section 74.1105 be revised to provide that a CATV system need not delay the commencement of new service, upon the filing of a timely petition under section 74.1109, unless it is ordered to do so by special order of the Commission. Entron claims that the last portion of section 74.1105 is presently inconsistent with section 74.1109(f), which it construes to mean that a ruling by the Commission on the "interlocutory question of temporary relief" is prerequisite to any stay of proposed operations. There is no conflict between the two sections. As in the case of new distant signals in major markets, the Commission's notification and ad hoc procedures contemplate that where a section 74.1109 petition concerning new service (not within the provisions of sec. 74.1107(a)) is filed within 30 days after notice, the proposed service shall not commence until after the Commission has either considered the matter on the merits or has specifically ruled on the question of temporary relief pending further procedures. We believe this to be a more orderly manner in which to proceed, rather than permitting a challenged service to start and later interrupting it. See *Second Report*, paragraph 140; memorandum opinion and order of May 27, 1966, in this proceeding, F.C.C. 66–456, 3 F.C.C. 2d 816, 820. Of course, service not challenged in the

petition may be commenced. And section 74.1109(f) not only provides for expedited consideration of new-service questions but would also permit the temporary relief of allowing some or all of the challenged service to commence pending further procedures where this is warranted in the public interest in the particular circumstances. We are not persuaded that this procedure should be altered.

CONCLUSION

Authority for the rule amendments adopted herein is contained in sections 1, 2(a), 3(a), 4 (i) and (j), 303, 307(b), 308, and 309 of the Communications Act of 1934, as amended.

Accordingly, *It is ordered*, This 5th. day of January 1967, that parts 21, 74, and 91 of the Commission's rules and regulations *Are amended* as set forth in the attached appendix B, effective February 28, 1967.

It is further ordered, That the petitions for reconsideration filed by the parties listed in the attached appendix A *Are denied*, except to the extent reflected herein.

It is further ordered, That the petitions for rulemaking, filed by WBEN, Inc., on July 12, 1966 (RM 1017), and by Jackson TV Cable Co. on August 15, 1966 (RM 1025), *Are denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

Petitions for reconsideration were filed by the following persons:

Akron Telerama, Inc.
Alice Cable Television Corp.
Alpine Cable Television, Inc.
Al-Pines Cable TV, Inc.
Amsterdam TV Cable Co.
Association of Maximum Services Telecasters
Black Canon Broadcasting Co., Inc.
Buckeye Cablevision, Inc.
Cabletron, Inc.
Cablevision Co. of Anniston
Central California Communications Corp.
Chattahoochee Valley CATV, Inc.
Columbus Broadcasting Co., Inc.
Courier Cable Co., Inc.
Cosmos Broadcasting Corp.
Cosmos Cablevision Corp.
Cox Broadcasting Corp.
Cox Cablevision Corp.
Delhi Video, Inc.
Entron, Inc.
Florida TV Cable, Inc.
Frontier Broadcasting Co.
Gloversville TV Cable Co., Inc.
Greater Lafayette TV Cable Co., Inc.
Jerrold Corp.
Jerrold Electronics Corp.
Johnstown TV Cable Co., Inc.
Logansport TV Cable Co., Inc.
McAllen Cable Television Corp.
Malibu Cable TV Inc.
Mesa Verde Broadcasting Co., Inc.
Mission Cable TV, Inc.
Mohican TV Cable Corp.
National Association of Broadcasters
New Channels Corp.
Newhouse Broadcasting Corp.
Old Pueblo Broadcasting Co.
Ottawa TV Cable Co., Inc.
Pacific Video Cable Co.
Perfect TV, Inc.
Pontiac TV Cable Co., Inc.
Rollins, Inc.
Savannah TV Cable, Inc.
Southwestern Cable Co. (statement of position)
Streator TV Cable Co., Inc.
Taft Broadcasting Co.
Telerama, Inc. (statement in support of petitions for reconsideration and opposition to petition for reconsideration of AMST)
TeleSystems Corp.
Television Communications Corp.
Trans-Video Corp.
Western Slope Broadcasting Co., Inc.
Wichtex Radio & Television Co., Inc.
WTVY, Inc.

APPENDIX B

I. Part 21 is amended as follows:

1. In § 21.712, paragraphs (c) and (d)(3) are amended, and paragraph (d)(4) is added, as follows:

§ 21.712 AUTHORIZATIONS FOR FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS.

* * * * * * *

(c) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 w or higher power.

(d) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (g) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the grade B or higher priority contours of both a satellite station and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

* * * * * * *

II. Part 74 is amended as follows:

1. § 74.11 is amended by the addition of a new final phrase and as amended reads as follows:

§ 74.11 CROSS REFERENCE.

See subpart D of part 1 of this chapter for general requirements as to applications, filing of applications, and description of forms; see § 1.1111 of subpart G of that part for the fees to be paid in connection with applications for facilities in the services covered in this part; and with respect to subpart K of this part, except where specific provision is made regarding practice and procedure, the provisions of subpart A of part 1 are applicable.

2. In § 74.1033, paragraphs (a) and (b)(3) are amended, and paragraph (b)(4) is added, as follows:

§ 74.1033 LICENSING REQUIREMENTS.

* * * * * * *

(a) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or

106-527—67——2

higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 w or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

* * * * * * * *

3. A new § 74.1100 is added to subpart K to read as follows:

§ 74.1100 Cross Reference.

See § 74.11.

4. In § 74.1103, paragraphs (a) and (b)(3) are amended, and paragraph (b)(4) is added, as follows:

§ 74.1103 Requirements Relating to Distribution of Television Signals by Community Antenna Television Systems.

* * * * * * * *

(a) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system, in whole or in part, with 100 w or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the grade B or higher priority contours of both a satellite station and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

* * * * * * *

5. § 74.1105 is revised to read as follows:

§ 74.1105 NOTIFICATION PRIOR TO COMMENCEMENT OF NEW SERVICE.

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted grade B contour the system operates or will operate, and to the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any.

(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however,* That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

6. In § 74.1107, paragraphs (a), (b), and (d) are amended, as follows:

§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND COMMISSION APPROVAL IN TOP 100 TELEVISION MARKETS; OTHER PROCEDURES.

(a) No CATV system operating in a community within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend

a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, the date on which copies of the notifications required by § 74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

* * * * * * *

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section; *And provided further,* That no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the *Second Report and Order* in dockets Nos. 14895, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

III. Part 91 is amended as follows:

1. In § 91.559, paragraphs (a) and (b) (3) are amended and paragraph (b) (4) is added, as follows:

§ 91.559 Authorizations for Operational Fixed Stations To Relay Television Signals to CATV Systems.

* * * * * * *

(a) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 w or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the grade B or higher priority contours of both a satellite station and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

* * * * * * *

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I vote to grant reconsideration and set aside the CATV rules adopted by the *Second Report and Order.*

In my opinion, the Communications Act does not give the Commission jurisdiction over CATV systems, and, accordingly, we are without authority to promulgate the rules.

It is also my opinion that recent copyright developments cast CATV considerations in a different context from that obtaining when the present rules were adopted. Those developments are the New York court's decision in *United Artists Television, Inc.* v. *Fortnightly Corp.* (255 F. Supp. 177, S.D.N.Y.) and H.R. 4347, 89th Congress, 2d session, to amend the copyright law. Both looked to imposing copyright liability on CATVs. They portend a significantly changed status for CATV.

The Commission majority's denial of reconsideration of the CATV rules is, at best, an effort to maintain the status quo until a more realistic policy is crystallized in the context of current developments. I believe that the status quo is so unrealistic, even in the context of present circumstances, that it should be discarded.

The heart of concern over CATV has been its possible evolution into pay television. Fear has been expressed that community antenna systems will be built and made viable by use of free programing from broadcast stations; and then, after the systems have so acquired a sufficient number of subscribers, they could afford to originate their own programs, and pay television would result. However, if CATV is made liable for copyright fees on programs, the argument of unfair competitive advantage in favor of CATV would be removed, and I believe that there would be no need to preclude program origination or, for that matter, to impose any artificial barriers protective to broadcasting or any other impediments to development of CATV in the marketplace.

Dissenting Opinion of Commissioner Lee Loevinger

(On Reconsideration of CATV Rules, Dockets Nos. 14895, 15233, and 15971)

The Commission is now issuing an opinion and order in a group of related CATV rulemaking proceedings, the effect of which is to refuse to reconsider or change (except in some minor details) the CATV rules announced on February 15, 1966, and issued on March 8, 1966. In view of the probability of congressional consideration and action in the present session of Congress, this result is not unreasonable, and I would be inclined to concur were it not for the accompanying opinion. The opinion which the Commission is issuing is a typical institutional product which has had very slight Commission-level consideration or analysis. It is composed mainly of institutional cliches, but the implications of the reasoning now given Commission approval are sufficiently drastic and extensive to warrant more detailed analysis. My main objections are three:

First, the opinion asserts Commission jurisdiction which is self-bestowed and unlimited;

Second, the opinion fails to come to grips with either the issues or the facts and rests on semantic confusion and superstition;

Third, contrary to the express representations made by the Commission in this matter, the effect of the rules as now construed is to impose a freeze or prohibition on technological development and economic expansion in this field.

The position now taken by the Commission on jurisdiction is a prime example of lifting oneself by one's own intellectual bootstraps. Reduced to its barest elements this intellectual bootstrapping operation consists of asserting jurisdiction without statutory authority or precedent, refusing to hear argument regarding the position on the ground that the decision has already been made, and then proceeding to act on the jurisdiction asserted, pointing to one's own assertion and prior decisions as precedent and justification. If this characterization seems exaggerated, attention is invited to the actual course of events.

Federal regulation of radio transmission was instituted because "the radio spectrum simply is not large enough to accommodate everybody," radio transmitting stations were operating in such numbers and manner that there was chaos in the spectrum, and regulation of radio transmission was therefore "as vital to its development as traffic control was to the development of the automobile." *NBC* v. *U.S.*, 319 U.S. 190, 210–214 (1943). The Communications Act was passed in 1934 when television was still wholly experimental and CATV was unheard of. The basic function of the Commission and its basic authority, so far as relevant to this subject, was to license radio transmitting stations (47 U.S.C., sec. 151).

During the 1950's CATV and other ancillary television transmitting techniques developed and a demand was made that the Commission assert jurisdiction over them and regulate them. In 1958 the Commission instituted an overall "Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV

'Repeaters' on the Orderly Development of Television Broadcasting," docket No. 12443. After a year of inquiry, the Commission issued an extensive report and order, finding, without dissent, that it was without jurisdiction over CATVs. *CATV and TV Repeater Services*, 26 FCC 403 (1959).

A few years later the Commission held that it was authorized to deny a license to transmit television signals by microwave radio transmission to a small community with one television station, on the ground that evidence of record showed that the economic impact of the applicant's operation would drive the television station out of business. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), affd. 321 F. 2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951 (1963). In *Carter Mountain* the Commission did not consider its own prior decision and its only comment on that precedent was: "To the extent that this decision departs from our views in * * * 26 FCC 403 * * * those views are modified."

The next step in the expansion of jurisdiction was the issuance of a "Notice of Inquiry" on April 23, 1965 (FCC 65–334). This was ostensibly an inquiry into whether the Commission had authority to promulgate rules regulating CATVs and particularly nonmicrowave CATVs (i.e., those transmitting signals wholly by wire and not employing radio transmission). However, attached to the "Notice of Inquiry" was a memorandum from the Commission general counsel asserting that the Commission did have plenary authority over CATVs "whether microwave is used or not." On the basis of this memorandum, without further discussion or inquiry, the "Notice of Inquiry" asserted the conclusion that "CATV systems are engaged in interstate communications by wire" and are, therefore, subject to the Commission's regulatory authority (FCC 65–334, par. 29). Neither the Commission's notice nor the memorandum on jurisdiction so much as mentioned the prior Commission determination that it lacked jurisdiction, and the memorandum relied wholly on general language in the Communications Act unrelated to either a specific grant of jurisdiction or the kind of action proposed by the Commission. See opinion of Commissioner Loevinger, 38 FCC 746. To no one's surprise, the Commission concluded this inquiry by reaching the decision that it did have jurisdiction to regulate cable CATV (i.e., systems not using any radio transmission) as well as microwave CATV. *Second Report and Order*, 2 FCC 2d 725 (1966).

A few months later in implementing its CATV rules the Commission issued a cease and desist order, the effect of which was to put a small town cable CATV out of business. *Back Mountain Telecable, Inc.*, 5 FCC 2d 735 (1966). A demand was made for oral argument before the Commission on constitutional questions involved in this assertion of Commission jurisdiction. The Commission summarily denied this request on the ground that the views expressed in the *Second Report and Order*, supra, "dispose of the questions raised," and, hence, "no purpose would be served by oral argument," despite the fact that a dissenting opinion pointed out that not only did the opinion cited not "dispose of" the constitutional issues, but it did not even consider or mention them.

In the present opinion the Commission considers the constitutional free speech issue for the first time, with the statement that it will treat this question "in greater detail"—presumably meaning "greater detail" than the complete absence of discussion in prior opinions. However, the present discussion is confined to citing *NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Lafayette Radio* v. *U.S.*, 345 F. 2d 278 (C.A. 2d 1965), for the proposition that "reasonable regulation of radio transmissions, if consistent with the public interest * * * is not violative of the right of free speech," and then concluding that:

> * * * there is no reason why the free speech principles should apply differently to those CATVs which derive their signals off-the-air than to those which use licensed radio.

The *Lafayette Radio* case sustained Commission regulation of Citizens Band radio on the grounds that the *NBC* case held licensing required by the limited facilities of radio. In the *NBC* case, the Supreme Court met the specific argument of constitutional free speech in these words:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. *NBC* v. *U.S.*, 319 U.S. 190, 226 (1943).

It should be self-evident from the Supreme Court statement that, contrary to the position of the instant opinion, there is every reason "why free speech principles should apply differently" to those CATVs which do not use radio transmission and to those which do. The whole reason and rationale for Government regulation in this field is the physical necessity for establishing and maintaining technical standards and order so that radio transmission is possible. Further, the rationale of the *NBC* case is based squarely and solely on the necessity of denying access to radio transmission to some because of the limited space in the spectrum. It makes no legal, technical, or logical sense to say that a case holding regulation to be justified because of the "limited facilities of radio" transmission, also justifies the same regulation of cable transmissions.

Furthermore, even the Commission opinions, when they have addressed themselves to the issue of jurisdiction, have based the conclusion of jurisdiction on the assertion that cable CATV is "engaged in interstate communication by wire" (FCC 65–334, par. 29)—on the theory that the signals carried have crossed a State line before being picked up by the CATV and transmitted by wire. But in the *Back Mountain* case a Pennsylvania CATV system was picking up Pennsylvania television stations and transmitting their signals by wire to its customers in Pennsylvania. (Some New York signals were also carried, but this activity was clearly separable for legal purposes.) The Commission has not yet seriously discussed or considered the legal basis of jurisdiction to order cessation of operation by a CATV system which picks up signals from a station within the State of its situs and transmits these by cable to customers in the same State. (The problem is brushed off by casual reference, without discussion, in a footnote in

the *Second Report*, 2 FCC 2d 732, footnote 9.) However, it has entered cease and desist orders against such activities and has been willing to order some such systems out of business. See, e.g., *Back Mountain Telecable, Inc.*, 5 FCC 2d 735 (1966).

Thus, the Commission has bootstrapped itself into an assertion of jurisdiction over all CATVs without ever squarely defining, analyzing, and considering the issues, the legal basis of its jurisdiction, and the limitations of the jurisdiction asserted. By this intellectual bootstrapping operation the Commission has moved from a specific statutory authority to license interstate radio transmissions to the assertion of a self-bestowed power to regulate and prohibit the intrastate transmission by wire of programs originating, broadcast, and received within the same State. As authority the Commission relies on a Supreme Court opinion upholding regulation of interstate radio transmission by licensing because of its unique characteristic and blandly asserts that there is no reason why the same principles should not apply to communication that is not by radio and that has entirely different characteristics. As the jurisdictional issue has not yet been clearly defined, considered, or determined, it is by no means clear that there is a majority of the Commission in support of the jurisdiction that is in fact being exercised, but so potent and impersonal is the bureaucratic institutional process that actions taken without definition or consideration of issues or principles become precedents which provide their own rationalization and finally preclude the Commission from ever defining, considering, and thoughtfully determining their legal validity and implications.

The assertion of jurisdiction on such a basis as this should be a matter of concern, but the underlying process and rationale and the implications for the future are even more important. The closest the Commission has come to specifying a basis for the jurisdiction it is now exercising is in the *Second Report and Order*, 2 FCC 2d 725 (1966). It there discusses jurisdiction as a matter of law (pars. 8–19), and assertion of jurisdiction (pars. 20–46). The arguments under the first category boil down to the assertions that CATV systems "are themselves engaged in 'interstate communication by wire,'" and that there is no "bar to jurisdiction" (pars. 12, 19). Although the basis for asserting that CATVs are engaged in interstate communication by wire is not spelled out, it appears to rest on the fact that some CATVs receive radio broadcasts originating outside the State of situs and then transmit the programs thus received over wires within the State of situs. The jurisdictional discussion under the second category is devoted entirely to the effort to show that regulation of both microwave and cable CATV is subject to Commission regulation because "this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service * * *" (par. 21, et seq.).

If such reasons are adequate to support jurisdiction, then there is no limit to the authority of this Commission. It is apparent at a glance that these reasons apply with even greater force to the great national television networks than to the CATVs. Yet the Commission

has so far given no indication of the fact that it has often disclaimed jurisdiction to regulate networks, and has asked Congress for such authority, which has so far been withheld. If the present position of the Commission is sustained, the Commission has plenary power to control networks by direct regulation without any other or further legislative action. This conclusion is hinted, though not expressly claimed, in a footnote in the *Second Report*, 2 FCC 2d 732, footnote 9. Before this conclusion is accepted complacently, it should be noted that the asserted jurisdiction is now being exercised in the CATV field to require the carriage of some programs and to prohibit the carriage of others.

The implications of the jurisdiction now being asserted go much further. The reception of a program originating outside the State and its transmission to customers by wire is said to constitute interstate communication subject to regulation. If a program is put on tape or film and thus transported across a State line, then transmitted by wire to customers within a single State, all of the grounds urged for jurisdiction apply equally, and there is no logical basis for differentiating this mode of communication from that now subject to the asserted jurisdiction. If this is so, it seems immaterial to the considerations most relied on by the Commission whether the recorded program is exhibited by transmission intrastate to a number of houses or exhibited to the public in one or a few theaters. So, by this reasoning, the Commission has jurisdiction over motion picture theaters—to be exercised as the Commission in its wisdom decides that the economic consequences of motion picture exhibition require in the public interest.

By similar reasoning it can easily be demonstrated that most news and feature material in newspapers come to the publisher through interstate communication by radio or wire. (Very few modern newspapers still rely on the pony express.) But since the Commission in effect holds that the precise mode of presenting the interstate communication to the public is immaterial, the fact that pictures and words are printed on paper and then distributed after being transmitted interstate will not be controlling. The Commission can cite the *NBC* case for the proposition that the first amendment does not prevent reasonable regulation in the public interest. Next the Commission will assert that "there is no reason why the free speech principles should apply differently" to newspapers than to radio merely because the situation involving the technical mode of communication is different—and the instant opinion stands for just this proposition. Thus, by its present course of reasoning, the Commission has jurisdiction to regulate newspapers—in the public interest, of course.

With far less ingenuity and disregard of logic than has been demonstrated by the Commission's opinions thus far, the asserted jurisdiction can be extended almost literally without limit. If it be objected that this reasoning is strained and untenable—which it is—then it must be answered that, assuming validity of the Commission's present assertion of jurisdiction, the extensions suggested rest on more cogent and coherent reasoning than that by which the Commission reached its present position.

The Commission, of course, disavows any present intention of claiming jurisdiction over newspapers, theaters, and other media of communications or other enterprises. But only a few years ago, the Commission was just as positively disavowing the jurisdiction which it now asserts. It would take only a change of personnel or of viewpoint—both of which are inevitable in time—for the Commission to assert the application of its self-bestowed jurisdiction to all modes of communication and entertainment.

I do not believe that Congress ever intended to grant or will in the future ever act to grant such a vague and limitless jurisdiction as the Commission now asserts and exercises. Even this cursory analysis should suffice to demonstrate that there is a strong practical, as well as legal, reason for insisting that the broad power of regulation should be confined within the jurisdiction specified by Congress in statutes, rather than left to be exercised at large by the hypothetical discretion of the institutional decision-making process.

My second objection to the opinion is that it so clearly illustrates the most common inadequacy of the institutional decision-making process. The opinion, like those that preceded it, simply fails to come to grips with either the issues or the facts and rests almost entirely on semantic confusion and superstition. The opinion summarizes the provisions of the rules and the positions taken by the several petitions for reconsideration. Beyond this, the opinion relies principally on the assertion that the results reached will serve the public interest. The public interest is referred to more than 20 times, and serves as the main rationalization for the results reached regarding jurisdiction (pars. 4, 5, 8), regarding satellites (par. 10), regarding the use of grade B contours (pars. 13, 32, 33, 34), regarding nonduplication (par. 18), regarding the CATV freeze in major markets (pars. 23, 25), and regarding the use of grade A contours (par. 30). The freeze in small markets, considered in more detail below, is rationalized by invocation of the term "orderly" (par. 44).

It should take no great sophistication to understand that basing a decision on the bald assertion that it is required or implied by some high-order abstraction, such as "the public interest," "orderly procedure," or "the most desirable course," without specifying some concrete referents relevant to the case, is simply semantic superstition, equivalent to basing a decision on necromancy, astrology, numerology, or tea leaf reading. It provides neither an explanation of past actions nor a guide to future actions, and means no more than that the decisionmaker has reached a result but cannot or will not say why.

What constitutes a "private interest" in a given situation is often relatively clear—the monetary profit of an individual or corporation—although this term is not often used except as an ignoble contrast to the more honorific "public interest." But the public and private interests are by no means antithetical. On the contrary, it is the theory of our system that most often the public interest will consist of allowing people to pursue their own private interests in their own way. In any event, the "public interest" is not a single specific criterion, a definite operational standard, or a term of self-evident

meaning. The most extensive and scholarly attempt to analyze the concept of "public interest" comes to the conclusion that

> * * * our investigation has failed to reveal a statement of public-interest theory that offers much promise either as a guide to public officials who are supposed to make decisions in the public interest, or to research scholars who might wish to investigate the extent to which governmental decisions are empirically made in the public interest. For either of the latter purposes, it would be necessary to have operational definitions of the public-interest concept; and neither my analysis nor that of other contemporary critics suggests that the public-interest theory prevalent in America today either is or is capable of being made operational * * *. It may be somewhat difficult for some readers to accept the conclusion that there is no public-interest theory worthy of the name and that the concept itself is significant primarily as a datum of politics. As such, it may at times fulfill a "hair shirt" function, to borrow Sorauf's felicitous phrase; it may also be nothing more than a label attached indiscriminately to a miscellany of particular compromises of the moment. Glendon Schubert, "The Public Interest," 220, 223 (1960).

An analysis of the public-interest concept in the light of Supreme Court decisions and in the context of Government regulatory power reaches essentially the same conclusion. Loevinger, "Regulation and Competition as Alternatives," 11 Antitrust Bulletin 101, 129 et seq. (1966). In upholding the concept as a criterion of action for the Commission, the Supreme Court was at pains to point out that it was "not to be interpreted as setting up a standard so indefinite as to confer unlimited power," but was to be interpreted by its statutory context, the nature of radio transmission and reception, and other factors. *NBC* v. *U.S.*, 319 U.S. 190, 216 et seq. (1943). However, just as the Commission opinion has taken the Court's conclusion regarding the first amendment and applied it to precisely the kind of situation which the Court's opinion precludes by specific statement, so has it also taken the public-interest criterion and converted it into a "standard so indefinite as to confer unlimited power." At no point in the instant opinion or any other opinion is there any indication of the necessity of specifying what the Commission conceives the public interest to mean in concrete terms in a particular situation. It uses the phrase "public interest" as "nothing more than a label attached indiscriminately to a miscellany of particular compromises of the moment."

The instant opinion leaves the reader without a clue as to whether the phrase "public interest" as used in support of the decision has any meaning at all. Could it mean conservation of usable space in the spectrum? Clearly not—for the activities which are forbidden and limited by the rules tend to conserve spectrum, and the activities which are protected and encouraged use large amounts of spectrum. Could it mean minimizing or avoiding electronic interference? Clearly not—for the activities which are forbidden and limited cause no interference, as they use no spectrum. Could it mean providing or encouraging more diverse programs? Clearly not—for the best hope of television program diversity in many communities is probably through CATV, but the rules will favor a single television station over the diversity of a multichannel system if there is any economic conflict or rivalry between them. Does the public interest mean giving the public

what it wants or demands? Clearly not—for most of the rules and all of the cease and desist orders in this field are aimed at forbidding a service which a large segment of the local public is demanding and willing to pay for. Does the public interest mean to encourage experimentation and the development of new technology? Clearly not—for the principal purpose of the rules and the Commission actions under them is to limit and restrain the development of CATV as a new technology.

The only specific meaning that can be attributed to the phrase "public interest" as it is used in the Commission opinion is that it means protecting the private interest of broadcasters by limiting or suppressing any actual or potential competition by CATV.

Perhaps this objective can be justified in whole or in part. But it certainly has less sentimental appeal when plainly stated than when couched in the vague euphemism of "public interest," and also requires a good deal more by way of factual support, close examination, and logical analysis than the Commission has yet given the subject. Invocation of the pious phrase "public interest" may stir the emotions but it adds nothing to the intellectual argument and is merely a way of avoiding thought and cutting off debate. It does not have even the rationality of an appeal to divine guidance which was implicit in trial by compurgation, ordeal, and battle. To rest a conclusion on the justification that it "serves the public interest," without specifying concrete referents, is simply semantic superstition in contemporary terminology.

Finally, I object to the Commission's refusal to examine and consider the fact that the rules as now construed and in practical operation have imposed a freeze or prohibition on the development and extension of CATV service.

The CATV rules have been the subject of bitter controversy both in the industry and on the Commission since they were first proposed. In February 1966 the Commission met and the Commissioners agreed on a plan for the regulation of CATV systems which was set forth in a public notice dated February 15, 1966. This notice was not simply a press release but was the actual draft of the agreement among the Commissioners, and the text was carefully examined by the Commissioners as a precise statement of what the Commission had, in fact, agreed upon. This is made plain by the three statements accompanying the Commission notice, which state the personal concurrences and dissents on particular points of the Commissioners making the statements.

One of the principal purposes of the Commissioners in promulgating the February 15 compromise plan was to avoid a freeze on all CATV development and expansion, which had been previously urged upon them. This was done by providing in substance that in the top 100 television markets no CATV operation could be commenced or expanded without specific Commission approval, after a full evidentiary hearing and a finding that the potential effects of the proposed CATV operation would not be substantially competitive with any existing or proposed television stations, and that such an impediment would not be imposed outside the top 100 markets. On the latter point, the

specific language of the notice, which embodied the Commission action, was:

> The Commission's prior approval after an evidentiary hearing will not be required by rule for proposed CATV systems or operations in markets below 100 in the ARB rankings. However, the Commission will entertain, on an ad hoc basis, petitions from interested parties concerning the carriage of distant signals by CATV systems located in such smaller markets.

Three weeks later, on March 8, 1966, the Commission issued its institutional opinion and the text of the rules which were to effectuate the plan adopted February 15. The opinion and rules were more than 80 printed pages of small type (2 FCC 2d 725–808). The Commission issued another public notice announcing the adoption of these rules "to effectuate its plan for regulation of all CATV systems, as announced on February 15, 1966 * * *." The March 8 notice again summarized the provisions of the plan and the rules, and stated, in substantially the same language as on February 15, that (with exceptions immaterial here) no CATV operation could be commenced or expanded in the top 100 markets except with Commission approval after a full evidentiary hearing, and that no prior Commission approval or hearing would be required in smaller markets.

Since these rules were promulgated the institutional construction and application has converted the small-market rule into the equivalent of the rule applicable to the top 100 markets. That has occurred in this manner. The Commission plan, and the rules, provided that CATVs could commence or expand operation in the smaller markets without Commission approval but that any interested person could file an ad hoc petition in any situation and that the Commission could impose additional or different requirements than the rules (47 CFR, sec. 74.1109; 2 FCC 2d 725, 805). This has now been construed to mean that where a petition is filed to impose additional requirements upon, or prevent the operation of, a CATV system in a market smaller than the top 100, the CATV cannot commence or expand operations until it has a specific order of approval from the Commission. In plain language, the mere filing of a petition under section 74.1109 operates to impose an absolute and indefinite injunction against commencement or expansion of any operation by any CATV. Thus, any place and any time that there is any licensee, permittee, applicant, potential applicant, competitor, or other interested person who desires to stop the operation of a CATV system, he is given full power to do so by the present Commission rules. The mere filing of a petition, regardless of its form or merit and without any review or examination by the Commission, suffices to impose a complete prohibition against operation of the CATV system involved.

Thus, the compromise plan of February 15, which was adopted to avoid a freeze of CATV development, turns out to be a compromise in form and words only. No operation can be commenced or expanded in the top 100 markets until after the lengthy and arduous process of an FCC evidentiary hearing has been completed—which inevitably requires several years at least. No operation can be commenced or expanded in any other market if anyone objects. In the top 100

markets the freeze or prohibition operates automatically and regardless of objection. In all other markets the freeze or prohibition must be invoked by some objection. But in practice there is no lack of objectors. So the Commission has—albeit unintentionally and unknowingly—in practical effect imposed a freeze on CATV development or expansion in all markets, with only a slight procedural differentiation between the top 100 markets and the smaller markets, despite its express disclaimers of such action in the public notices of February 15 and March 8. This result the Commission now recognizes and affirms on the grounds that it is "more orderly" (par. 44). Needless to say, this verbalism is no more meaningful than the more favored "public interest."

While I agree with Commissioner Bartley that the status quo in this area is so unrealistic that it should be discarded, I might be inclined to concur in an opinion and order that did no more than maintain the present rules on the ground that congressional action may be expected to provide guidance to the Commission in the near future. However, the present opinion has the form of a discussion of the merits, but without factual or logical substance. The history of the development of the Commission position on this subject, first as to jurisdiction and, more recently, as to the imposition of a general freeze, is such that no one can surmise, much less predict, from the semantic confusion and opacity of the instant opinion, what the Commission may do in the future.

Perhaps the Commission should not attempt to regulate CATVs at all. Perhaps the Commission should prohibit CATVs altogether. Perhaps the Commission should attempt to write some clear and consistent rules to insure that CATVs will provide the public with better and more diverse program service than the public would get in the absence of CATV. Perhaps a revision of the copyright law or of section 325 of the Communications Act to give proprietary rights to program originators is the best approach to this field. The only thing that is quite clear to me is that there is no hope of finding a rational and practical course until the Commission climbs out of the intellectual morass and dispels the semantic fog in which this subject is now lost.

SEPARATE STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in this disposition of the petitions for reconsideration. For the reasons set forth in my separate statement issued in connection with the *Second Report and Order* in dockets Nos. 14895 et al., 2 F.C.C. 2d 725, 868 (1966)—which are reinforced by the petitions and associated pleadings filed since—I still believe that there are persuasive reasons why the Commission should have provided more than same-day nonduplication protection and should have treated markets below the top 100 in the same way as it did the largest markets in connection with the importation of distant signals, and would, therefore, have preferred modification of the rules as to these matters. However, there being no disposition on the part of most of my colleagues to strengthen the rules, and the matter being before us on

reconsideration, I think it appropriate to approve the action here taken so as to keep at least the rules we now have.

There are a number of additional changes I would have liked to make. I believe we should have deleted footnote 40 and made the predicted grade B contour controlling as to questions of carriage. I am also impressed by the showing made with respect to the problem of protection against prior duplication of network programs on Canadian stations whose signals are carried on cable systems in this country. I think it would have been desirable to handle this by rule. However, I recognize that there might be a problem of notice, and join in the conclusion that this will have to be dealt with on the basis of individual requests for nonduplication protection in addition to that provided by the rules.

Under all the circumstances, this memorandum opinion and order represents the best results obtainable at this time. Although I think more effective regulation is needed, I concur in this action.

I should like also to comment briefly on Commissioner Loevinger's dissent. As I understand that dissent, it asserts three main points: (1) That we have asserted "self-bestowed and unlimited" jurisdiction; (2) that our opinion fails to set out the public-interest considerations involved; and (3) that we have imposed a freeze on CATV expansion in all television markets. I believe all three points are mistaken.

First, we have not asserted unlimited jurisdiction. Rather, the assertion of authority rests squarely upon the explicit provisions of the Communications Act. The act says that its provisions "shall apply to all interstate * * * communication by wire or radio * * * and to all persons engaged within the United States in such communication * * *" (sec. 2(a)). A CATV system involves an "interstate communication by wire" within the definition set out in sections 3 (a) and (e). Indeed, while Commissioner Loevinger appears to question this in some circumstances (by ignoring cases such as *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6, 1962), cert. den. 371 U.S. 820),[1] the CATV industry itself has conceded that it is in interstate commerce. See brief of the National Community Television Association before the Connecticut Public Utilities Commission, docket No. 10250 (1964), page 9; exhibit B, page 20. The provisions of the act are therefore applicable to CATV operations. The provisions which are being applied in our finding and assertion of jurisdiction are section 307(b), calling for local services equitably distributed among the States and communities; section 303(h), giving the Commission the authority to establish the service areas of stations (in order to achieve a system of local outlets), and section 303(s), the all-channel law establishing a policy of promotion of UHF outlets, particularly in the major or medium-sized markets, to provide a competitive, nationwide television service. If one were to draw a diagram of the basis for our jurisdiction to deal, for example, with importa-

[1] Commissioner Loevinger also ignores the fact that network programing, which appears on all CATV systems, clearly involves interstate transmission by both wire and radio, so that a CATV system is a link in the chain of interstate commerce when it carries such programing.

tion of distant signals into the major markets, it would, I think, look something like this:

The Commission may make rules to prescribe the conditions	Sections 4(i), 303(r)
under which a TV signal may be extended,	Section 303(h)
via the medium of CATV,	Sections 2 (a), 3 (a), (e)
in order to prevent frustration of the congressional scheme of television regulation.	Sections 307(b), 303(s)

The above is a perfectly straightforward assertion of jurisdiction. It is not "self-bestowed" or "unlimited." As to the constitutional free speech argument raised, the short answer is that CATV systems constitute a part of the scheme of television distribution (*Clarksburg Publishing Co.* v. *FCC*, 225 F. 2d 511, 517 (C.A.D.C., 1955)). Unlike any other purely nonbroadcast mode of expression, they make use of radio signals as a sine qua non of their operation. Therefore, their reasonable regulation to prevent frustration of the congressional scheme for our broadcast service does not violate the first amendment.[2] *NBC* v. *U.S.*, 319 U.S. 190, 227; *Carter Mountain Transmission Corp.* v. *F.C.C.*, 321 F. 2d 359 (C.A.D.C., 1963), cert den. 375 U.S. 951; *Lafayette Radio Electronics Corp.* v. *United States*, 345 F. 2d 278 (C.A. 2, 1965). And the fact that we have undertaken their regulation—as interstate communications by wire which extend the service areas of the TV stations they carry and which come explicitly within the act—does not mean that the Commission could regulate newspapers or bowling alleys or other such enterprises merely because they have an impact on broadcasting, and the Commission has so stated. *Second Report and Order*, 2 FCC 2d 725, at 729–730, paragraphs 11–12.

Commissioner Loevinger's most astonishing argument, however, is his assertion that the Commission has not set forth what the public interest is in the context of the present matter. First, I must point out that the matter is before us on reconsideration, and we, therefore, stated at the outset (par. 1 of our memorandum opinion and order) that we would not deal again with matters fully covered in our prior decision. Surely, that is established and proper procedure.

Second, our prior decision set forth at length what we believe to be the public-interest considerations in this field. We there pointed out three reasons why the public interest would not be served if CATV systems were to replace TV stations, particularly potential new UHF stations:

> (1) CATV systems have not served as outlets for local expression; additional service via cable means service brought in from other communities and not geared to serving the needs and interests of the local public. Com-

[2] Commissioner Loevinger baldly states (p. 2): "Neither the Commission's notice nor the memorandum on jurisdiction so much as mentioned the prior Commission determination that it lacked jurisdiction * * *." But the notice did deal with this issue, stating (par. 28, 1 FCC at 464), "We have on more than one occasion in the past concluded that the Communications Act, without amendment, probably would not support broad jurisdiction, though not disclaiming jurisdiction to prevent adverse CATV impact on television broadcasting." (Footnote citing *Frontier* and 1959 report omitted.)
And the *Second Report* itself dealt with this question at length (pars. 16–18, 2 FCC 2d 725, at 732–734) and again pointed out that we had found it unnecessary, in *CATV and TV Repeater Services*, 26 FCC 403, "to pass on the question of our authority to regulate them [CATV systems] directly because of adverse effect on broadcasting" (26 F.C.C. at 431).

missioner Loevinger indicates that the CATV industry could serve effectively in this respect. But that is not the present practice of the industry on the record before us. Surely an important public-interest question is raised by this situation.

(2) CATV systems do not serve rural or less densely populated areas—it simply costs them too much to do so. If CATV operations stifle or cripple new and projected UHF stations, therefore, it means that people in the built-up areas would be receiving additional service at the expense of those in the rural areas—again a situation inconsistent with the public interest.

(3) And, finally, CATV service is a form of pay television, since people have to pay to receive such service. There are people who cannot afford, or do not wish, to pay for television service. If, then, CATV systems replace or abort UHF outlets, again people on the cable would be getting additional service at the expense of others.

Commissioner Loevinger may disagree with the above considerations, but he cannot say that they have not been stated by the Commission. They have been fully set forth and discussed. See *Second Report*, at pages 770–776. In fact, while he adhered to his earlier view that the Commission does not have jurisdiction to regulate all CATV operations, and expressed dissatisfaction with the form of the opinion, Commissioner Loevinger stated, in his separate statement attached to the *Second Report*, that he concurred in the substantive provisions of the order. While indicating that he did not think these provisions to be wholly logical or to represent the best method of dealing with the subject, he said that the result reached in the rules adopted seemed to him "the best and most reasonable proposal that has any practical chance of securing approval by a majority of the Commission." He then added: "This is, in my opinion, a legitimate basis for making a legislative judgment." It would appear to me that Commissioner Loevinger must, therefore, have agreed with the essence of the public-interest bases for the Commission's action, though he did not like the precise way in which they were formulated. If not, and he had some as yet unstated basis for joining in approving the substantive provisions of the rules, that in turn must have had some foundation in concepts of the public interest. Either Commissioner Loevinger has joined in approving our rules on the general basis restated above, or it is he, not the majority, which has failed to state the basis for his position last March.

We also set forth the two grounds for our concern that CATV might adversely affect, or indeed thwart, the present promising UHF development: The economic impact ground (*Second Report*, at pp. 770–778) and the unfair competition ground (*Second Report*, at pp. 778–781). We stated that we could not now gage the extent of that adverse impact, and that that was a matter to be explored in evidentiary hearings (par. 126). I could go on, but this would only involve repeating the lengthy discussion in the *Second Report*. When Commissioner Loevinger states that the public interest is undefined in this area, he is simply ignoring what the Commission has said.[3] He is also ignoring the public-interest policy guidance Congress laid down

[3] If Commissioner Loevinger is concerned about the carriage and nonduplication aspects of the rules, these matters were extensively treated, particularly in the *First Report*, 38 FCC 683, 699–715. In any event, they have already been found to be reasonably related to the public interest. See *Carter Mountain Transmission Corp.* v. *FCC*, 321 F. 2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951.

for us in the 1962 all-channel receiver legislation. See, particularly, paragraph 114 of the *Second Report*.

Finally, Commissioner Loevinger states that the Commission rules "as now construed" in effect impose a freeze when a petition against new CATV service is filed under section 74.1105. The rules have not been "now construed" in such a way as to produce a result different from that originally indicated. Section 74.1105 states in explicit terms that new CATV service, against which a petition has been filed, shall not be commenced until Commission action on the petition. The *Second Report* also so stated (par. 100), and the Commission was well aware of this when it adopted the rules. I know I was, and I cannot see why Commissioner Loevinger was not also. The two-page public notice issued on February 15, 1966, simply set forth the essence of the new rules the Commission had decided to adopt, and certainly did not purport to state the detailed provisions of our action. The provision that, where a petition is filed with respect to proposed CATV service, new service shall not be commenced until after the Commission has ruled on the matter is fully consistent with the provision of the public notice cited by Commissioner Loevinger, and was necessary to prevent institution of a service upon which the public would come to rely pending Commission consideration of the matter. Experience with this problem has demonstrated the difficulty, if not impossibility, of ordering withdrawal of service once it is established. Thus, if the Commission is to give any meaningful consideration to petitions directed against proposed CATV service, it must maintain the status quo until it has had time to rule on the question.

And this is no freeze. The Commission stated that when such a controversy involving new service arose, the Commission would expeditiously rule upon the matter (*Second Report*, par. 98), and the rules so provide (sec. 74.1109(f)). I think that such 74.1109 matters should be acted upon promptly after the filing of the last pleading, and see no reason why they cannot be disposed of without undue delay. Certainly, common sense indicates that we act expeditiously before establishment of the service, rather than after the fact when our action could be disruptive. The whole thrust of the Communications Act is to this effect. See *Second Report*, paragraph 140. If there are undue delays in this respect, I would be glad to join with Commissioner Loevinger, not in scrapping a perfectly sound procedure, but rather in seeing to it that it is carried out.

Before the Federal Communications Commission, Washington, D.C.

Docket No. 16786

IN THE MATTER OF THE PETITION OF MIDWEST TELEVISION, INC. (KFMB–TV), SAN DIEGO, CALIFORNIA, FOR IMMEDIATE TEMPORARY AND FOR PERMANENT RELIEF AGAINST EXTENSIONS OF SERVICE OF CATV SYSTEMS CARRYING SIGNALS OF LOS ANGELES STATIONS INTO THE SAN DIEGO, AREA, PETITIONER

v.

MISSION CABLE TV, INC., EL CAJON, CALIFORNIA, SOUTHWESTERN CABLE CO., SAN DIEGO, CALIFORNIA, PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIFORNIA, TRANS-VIDEO CORP., EL CAJON, CALIFORNIA, RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIFORNIA, AND POWAY CABLE TV, POWAY, CALIFORNIA, RESPONDENTS

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners BARTLEY and LOEVINGER dissenting; Commissioner JOHNSON not participating.

1. The Commission has before it for consideration a petition filed on March 17, 1966, by Midwest Television, Inc. (Midwest), licensee of KFMB–TV, San Diego, California, a supplement thereto filed on April 4, 1966, and responsive pleadings in connection there-

with.[1] The petition was filed pursuant to Section 74.1107 and 74.1109 of the Commission's Rules, adopted March 8, 1966, effective March 17, 1966 (31 F.R. 4540)[2], and requests basically that the Commission immediately order respondents, pending final disposition of the petition, to cease and desist from extend-

[1] The following responsive pleadings have also been filed and considered: Comments of Jack O. Gross, (Gross) permittee of Station KJOG–TV, San Diego, filed on April 15, 1966; Opposition to petition and supplement filed by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp. (hereafter collectively referred to as Mission) on April 18, 1966; Opposition to petition and supplement filed by Southwestern Cable Co. (Southwestern) on April 18, 1966; a Statement of Position filed by Southwestern on April 18, 1966; a Motion to Sever filed by Southwestern on April 18, 1966; a Motion to Dismiss filed by Southwestern on April 18, 1966; an Opposition and Petition to be Dismissed filed by Rancho Bernardo Antenna System (Rancho) on April 18, 1966; a Reply of Petitioner to Opposition to petition for immediate temporary relief and Answer to Motion to Dismiss petition for immediate temporary relief filed by Midwest on April 25, 1966; an Answer to Motion to Sever filed by Midwest on April 25, 1966; a Reply of Petitioner to Oppositions to petition for permanent relief and Answer to Motions to Dismiss petition for permanent relief filed by Midwest on May 2, 1966; and a Reply to Answers of Midwest to Motions to Sever and Dismiss filed by Southwestern on May 5, 1966. Additional interlocutory pleadings concerning extensions of time were filed and have been acted upon, pursuant to delegated authority. On April 6, 1966, Poway Cable TV filed a motion asking that it be dismissed as a party respondent; Midwest filed an answer stating that in view of the agreement reached, it would be appropriate to dismiss Poway as a party. We will grant this request.

[2] Section 74.1107 of the Commission's Rules relates to CATV systems operating or proposing to operate in one of the top 100 television markets and carrying distant television stations' signals. Section 74.1109 of the Rules relates to the filing of petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

ing service to additional subscribers served by their respective systems within the Grade A contours of the San Diego stations and, after any necessary hearing, issue a final order appropriately confining carriage of Los Angeles television signals by respondents' San Diego area systems. In its later pleadings, Midwest modified its initial request for temporary relief to a request that respondents be directed not to extend the Los Angeles television signals to subscribers beyond the specific geographic boundaries of areas in which subscribers were being served on February 15, 1966.

2. In support of its requests for relief, Midwest states that respondents are the holders of franchises to operate CATV systems issued by the cities of San Diego, Chula Vista, National City, La Mesa, Imperial Beach, El Cajon, and San Diego County.[3] The City of San Diego has a population of approximately 648,500 occupying 208,631 housing units and the County of San Diego has a population of approximately 1,213,000 occupying 379,483 housing units; nearly all of the county population lies within the Grade A contour of KFMB–TV and San Diego is ranked by the American Research Bureau as the 54th market based on net weekly circulation. San Diego is presently served by five television stations, a construction permit has been issued for Channel 51 (KJOG), an application is pending for Channel 15, and the assignment of an additional UHF commercial channel to San Diego is under consideration in Docket No. 14229. Midwest alleges that respondents' CATV systems carry the signals of between six and nine Los Angeles television

---

[3] Trans-Video is 100% owner of Pacific Video, majority owner of Mission Cable and has a minority interest in Southwestern. It has no franchises and is a management company. Trans-Video operates under contract the CATV systems owned by and franchised to Mission, Southwestern and Pacific.

stations none of which stations provide measured or calculated Grade B service to more than the northern portion of the city of San Diego nor to any parts of six other separate communities adjacent to the city; that all of Mission's systems except Poway supply regularly eight Los Angeles stations beyond their calculated Grade B contours (Mission's Poway system carries three beyond Grade B signals and the independent Poway system carries two); that neither Poway nor Rancho Bernardo receive actual Grade B service from any Los Angeles stations; and that Southwestern supplies regularly to all of its subscribers at least three Los Angeles stations beyond their calculated Grade B contours.

3. Midwest goes on to allege that within the past year, and increasingly in recent months and weeks, there has been "widespread and intensive CATV activity within KFMB–TV's Grade A contour" and that service to Poway, Chula Vista and Pacific Beach was instituted only two to four months prior to the filing of the petition. It is alleged that the other systems have greatly extended their lines and substantially increased the number of subscribers since April of 1965; that the systems have increasingly emphasized the laying of lines, far outstripping the solicitation and hooking up of new subscribers; with cables being strung in some areas for miles with very few drops and in some cases none; and in those communities where the systems are operational or wired, only portions of such communities are involved. Midwest estimates that as of February 15, 1966, there were 17,000 homes in the county and within the station's Grade A contour connected to cable systems, of which approximately 6,500 were located in the city; that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are at present approximately

294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and this figure represents approximately 78% of all homes in the county within the Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are alleged to be in areas covered by CATV franchises. Because of the alleged emphasis on line extensions rather than on hook-ups, Midwest contends that a large number of new subscribers could be wired up in a relatively short time even if there were no further cable expansion.

4. Midwest contends that the importation of a multiplicity of distant signals will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience notwithstanding the non-duplication rules. Midwest points out that in its case, 44% of its programming is non-network and will be subject to duplication and that, with respect to the San Diego independent stations, nearly 100% of their programming will be subject to duplication; that virtually all of the non-network recorded programs now under contract to the San Diego stations are also under contract or available to the Los Angeles stations; that the importation of such programs impairs their value to the San Diego stations and causes audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programming; that over 94% of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents; and analysis of the remaining 6% indicates that the same public interest is or would be served in an alternate way by the San Diego stations.

5. Midwest also alleges that respondents' systems,

with the exception of Poway Cable TV, carry the signal of KFMB–TV on channel but materially degrade the quality of the signal broadcast, particularly the color signals; that the signal of the local UHF station, KAAR, is markedly worse on the cable than those of the VHF stations; that the signals of the Los Angeles stations appear better on the cable than those of the local stations despite the fact that the Los Angeles stations generally do not place a Grade B signal over San Diego; and that the effect of degradation has been not only to damage the local station's reputations but has placed the distant signals on a higher competitive level than the local signals.[4] Finally, Midwest contends that in addition to the foregoing considerations, the CATV situation in San Diego falls squarely within the principle enunciated in the *Second Report* in footnote 69, where the Commission pointed out that, although, in general, CATV activity which does not involve extension of a signal beyond its Grade B contour may continue, an important exception exists where two major markets fall within one another's Grade B contours. In such a situation, the carriage by a CATV system in Baltimore, for instance, of the Washington signals might equalize the quality of the distant signals, change the viewing habits of the local population and affect the development of local television stations. Midwest contends that the San Diego-Los Angeles situation is a classic illustration of this problem and that relief should be afforded on this basis as well as the basis previously set forth.

[4] Midwest states that because of degradation, the Pacific Beach system carries KFMB–TV on Channels 8 and 2, but that this dual carriage confuses the public, weakens its station identification and causes possible ratings losses.

6. In view of the above, Midwest requests, essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondent be ordered to confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographic areas where the systems were operating on February 15, 1966.[5] In a document filed on April 15, 1966, Jack O. Gross, holder of a construction permit for UHF station KJOG-TV, Channel 51, San Diego, supports the Midwest petition and states that a grant of the requested relief would materially contribute to the success of UHF in San Diego generally and KJOG in particular.

7. Mission's opposition, filed on behalf of Mission, Pacific and Trans-Video, contends that the Commission can only issue temporary relief in accordance with the provision of Section 312 of the Communications Act (47 U.S.C. 312(c)) and that there is no statutory authority for the type of relief requested. Mission contends that such relief is analogous to a motion for stay and that, as such, it is inadequate be-

[5] In support of its request for temporary relief pending the outcome of any hearing, and in an attempt to describe the extent of respondents' operations in San Diego and southwestern San Diego county as of February 15, 1966, Midwest filed a Supplement to its petition, to which it attached a map purporting to show that there were eight separate islands of CATV subscriber service as of February 15, 1966 located in recognized geographical areas in San Diego which were further circumscribed by recognizable and known geographical limitations and boundaries within the larger geographical areas. In the Supplement, Midwest alleges that since February 15, 1966, the respondents have extended lines and service beyond the specific boundaries within the general areas and also into entirely new geographic areas.

cause Midwest has failed to show irreparable injury to itself (Mission contends that Midwest's allegations in this regard are only conclusionary and not supported by material facts); has failed to demonstrate injury to the public (Mission contends that allegations in this regard are also conclusionary and highly speculative and denies that there is any degradation of the San Diego stations' signals by the CATV systems); and has not demonstrated that there is a likelihood that it will succeed on the merits (Mission contends that Midwest's allegations relating to a "pell-mell" extension of cable lines are completely unsupported by facts, is untrue, and that respondents have merely continued their normal wiring activity).

8. Mission alleges further that there is nothing in the rules which prohibits the actions of respondents which Midwest seeks to prevent since the rules speak of extension of signals to "new geographic areas" and Midwest has not factually supported its allegation that there has been such an extension. Further, Mission contends, Midwest has failed to show that the signals extended are beyond predicted Grade B and it is Mission's position, in any event, that its Poway system is "grandfathered" under the rules since it was franchised under the San Diego county franchise; service had commenced prior to March 17, 1966, and the county-wide franchise authorized CATV at any place in San Diego county outside of corporate limits.[6] Mission states that the outside-of-corporate

[6] Midwest had alleged, in its petition, that Mission's system in Poway had commenced operations after February 15, 1966 in violation of Section 74.1107 of the Rules, and requested that the Commission issue a cease and desist order as to said system. On April 6, 1966, after an independent inquiry, the Commission issued an Order to Show Cause why a cease and desist order should not be issued with respect to the Poway operation. FCC

limits construction in San Diego has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Finally, Mission alleges, with respect to the request for temporary relief, that the public will be irreparably injured since it ignores the need for expansion of television service, prevents expansion of educational television, deprives the public of improved color reception, municipalities of revenues from CATV and potential subscribers of the same choice of programs that their neighbors who have already subscribed have; that respondents will be irreparably injured since their franchises may be forefeited if construction is delayed, contract rights may be lost, and respondents' employees may lose their jobs; the Commission's Rules are yet untested and are probably illegal; and the rights of Midwest or the public can be fully protected by a decision on the merits, after a hearing, if the Commission determines that any action is required.

9. As to Midwest's request for permanent relief, Mission incorporates its same arguments with respect to the request for temporary relief and contends further that its franchises were obtained before the Commission decided to exercise jurisdiction and that construction and installation of cable was started before February 15, 1966 or March 17, 1966. Additionally, Mission alleges that while CATV is a less expensive and more convenient type of antenna service for signals already present in San Diego, CATV is needed in certain areas in order to provide adequate reception of San Diego Channel's 8 and 10 and that

66-292, April 6, 1966. On June 22, 1966, the Commission issued a Cease and Desist Order as to Mission's Poway system. FCC 66-548.

CATV expansion is necessary for the acceptance and viability of UHF stations. Mission points out that since the San Diego stations' programs can not be duplicated on the same day and surveys show that during prime time the San Diego stations have 84% of the viewing audience, it does not appear that fragmentation of the remaining 16 to 20% of the television audience, among the four or five Los Angeles independents and the San Diego UHF, could have any serious impact on the ability of the San Diego network stations to continue their operations. Finally, Mission contends that the addition of subscribers to its systems after February 15, 1966, does not constitute extensions to new geographical areas since, under its city franchises, the appropriate geographic boundaries are the city limits and, under its county franchises, the appropriate boundaries are the unincorporated areas of the county.[7] In view of all of the above, Mission requests that Midwest's petition, both as to temporary and permanent relief, be denied.

10. Southwestern filed an Opposition, a Motion to Sever, and a Motion to Dismiss.[8] In its pleadings, Southwestern alleges that the petition must fail since Midwest has failed to show that its system is carrying beyond Grade B signals and that Southwestern's engineering studies show that the commercial television signals which it is carrying are all of Grade B intensity. Southwestern further contends that its sys-

[7] Mission submitted a map with its opposition showing the area of each franchise; the portion of each franchise receiving service prior to February 15, 1966; the portion of each franchise receiving service after February 15, 1966; and the portion of each franchise which was "fielded" and/or under construction as of April 12, 1966.

[8] Southwestern also filed a Statement of Position which is being treated in connection with the petitions for reconsideration of the Second Report and Order.

tem is "grandfathered" since it began operating prior to February 15, 1966, is not expanding throughout the entire community or into new areas, and has only continued normal wiring operations. Moreover, Southwestern alleges that its system helps UHF and that while Midwest has submitted no probative data regarding impact, Southwestern's market study, a copy of which it attached as an exhibit to its opposition, shows that CATV helps UHF generally and Channel 30 specifically since carriage of the UHF station on the cable increases the station's audience, improves its picture quality, and provides greater penetration for, and viewing frequency of the station. Southwestern also points out that Midwest's claim of signal degradation does not relate to its system since it has always carried Midwest's station on channels 8 and 2 of the cable. Southwestern also claims that its franchise area is unique since the residents and antennas in that area are oriented to the Los Angeles stations and since it is within the predicted or measured Grade B contours of the commercial signals of the stations carried on its system. Southwestern contends that Midwest's showing of fragmentation has no applicability to its system since the survey was conducted in a part of San Diego where the off-the-air reception of the Los Angeles stations is of less quality, the survey was conducted prior to the commencement of service by Southwestern and the various sections of San Diego vary significantly, and the audience survey findings relate to areas of San Diego where the CATV systems carry the full schedules of the Los Angeles CBS and NBC stations while Southwestern's system carries only the San Diego CBS and NBC stations. Finally, Southwestern alleges that while Midwest has failed to show that it would be irreparably injured by denial of the temporary relief, Southwestern would

suffer irreparable injury since a grant of temporary relief would dry up Southwestern's financing and cause bankruptcy. As to the request for permanent relief, Southwestern contends that while Midwest has essentially requested the Commission to designate a "Carroll" type issue, it has completely failed to furnish detailed evidentiary material. Accordingly, Southwestern requests that it be severed from the other respondents and that the petition and supplement, insofar as they relate to it, be denied or dismissed.

11. Rancho Bernardo, in its opposition, states that it operates a system in northern San Diego under a franchise from the city of San Diego and that the system is part of a housing development of 5,400 acres, approximately 400 acres of which have been developed. The system is designed to serve only the residential community and there is no intention of extending beyond those boundaries. Rancho Bernardo states that there are now approximately 1,000 subscribers to the system or 99% of the occupied housing units and service is expanding in an orderly fashion to serve all the new residential units with the timing of service extension being determined solely by the sales of residential units. Rancho Bernardo contends that the area receives unsatisfactory off-the-air television reception, is not within the Grade A contour of KFMB–TV, and may be within the Grade B contours of some Los Angeles stations. Rancho Bernardo denies that it degrades the KFMB signal and alleges that a grant of temporary relief would irreparably injure it because it would impede the sales of homes and would not help KFMB since it would make its signal unavailable in the area. Rancho Bernardo requests denial of the temporary and permanent relief and asks that it be dismissed from the proceedings.

12. In its responsive pleadings, Midwest points out that there is no factual dispute as to Mission's and Southwestern's intentions to continue expansion throughout the various geographic areas covered by their franchises. Midwest contends that temporary relief is necessary to prevent this great expansion of these major market systems until resolution of the public interest questions presented. Midwest alleges that, similarly, with limited exceptions, there is no real dispute as to the regional and specific geographic areas described by it; that since respondents have not wired up all of the homes within the specific geographic areas designated, restriction to such areas, *pendente lite,* would not prevent normal wiring operations; and that, therefore, there is no showing by respondents that an interim stay would impair the ability of the systems to continue operations. Midwest alleges that Mission makes no claim that its viability would be impaired and that Southwestern's claim of irreparable injury assumes a total prohibition against new subscribers; Southwestern does not claim that if it were limited to new subscribers within the specific geographic areas designated as of February 15, 1966, it would be irreparably injured.

13. Specifically, with respect to Mission, Midwest alleges that it has offered no factual information to refute the allegations of rapid line expansion; that Mission's map, in large part, confirms the boundaries specified by Midwest and, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966; that Mission's arguments regarding need for CATV service are invalid because 1) the entire public will lose if the local stations are forced off the air or required to curtail operations and 2) over 94% of the Los Angeles stations' programs have been, are, or will be essen-

tially duplicated by the programming of the San Diego stations; and that irreparable injury to Mission's systems has not been demonstrated since 1) there has been no showing that Mission's systems were not viable as of February 15, 1966, 2) there has been no showing that its franchises or contracts *will* expire or be forfeited if interim relief is granted (Midwest points out that the franchises do not require carriage of the Los Angeles stations and that the systems could expand without restriction carrying only San Diego signals); and 3) employee lay-off would occur only if respondents were ordered to halt all normal wiring and hook-up of new subscribers, but this has not been requested. Mission's county-wide grandfathering argument, contends Midwest, completely ignores the meaning of paragraph 149 of the Second Report and Order.

14. Midwest alleges, in response, that Southwestern does not challenge Midwest's designation of appropriate geographic areas and that since there are thousands of residents in these areas not yet on the cable, a grant of temporary relief as to Southwestern would not halt its normal wiring activities (Southwestern claims about 900 subscribers at present). Further, Midwest alleges, Southwestern's argument as to being "grandfathered" in the entire franchised area, because it was serving 350 subscribers on February 15, 1966, completely ignores the import of the Second Report and Order; Southwestern's attempt to show that its franchised area receives Grade B signals from Los Angeles is completely inadequate from an engineering standpoint and its market survey techniques are defective and its conclusions unsupported.[9] Finally, Midwest contends that while South-

[9] Midwest points out that while cable subscribers interviewed had two UHF stations available to them (Channel 28, Los

western's allegations concerning impact relate to the short run benefits to UHF of carriage on CATV, these benefits decrease as penetration of all-channel receivers increases and that Southwestern has set forth no basis for being treated differently than the other respondents in this proceeding.[10] As to Rancho Bernardo, Midwest states that in light of the representations as to extension Midwest will not press its request for temporary relief. However, Midwest contends that no basis has been shown for dismissal of Rancho Bernardo from the proceeding; that dismissal of Rancho Bernardo would have the effect of grandfathering an area 1350% larger than the area in which service is presently being rendered; and that no allegation has been made that Rancho Bernardo's participation would constitute a hardship to it or cause it damage.

15. With respect to its request for permanent relief, Midwest states that the real issue is whether CATV should be allowed to import distant signals which would result in impairing the service capabili-

---

Angeles, and 39, San Diego) the Los Angeles UHF is not available off the air, and the survey only proves, at most, that viewers with two available UHF stations to watch, will view UHF 1.77 times as much as viewers with one, and that, if UHF viewing by cable subscribers is divided equally between the two stations, Channel 39 is viewed 11% fewer times in cable homes than in non-cable homes. Midwest also pointed out that the survey proved nothing as to reception quality on cable since no distinction was made between Channels 28 and 39 and it was not determined whether the non-cable homes surveyed had UHF antennas.

[10] Southwestern, in its responsive pleadings, repeats its allegations that its franchise area does receive Grade B signals from Los Angeles and that its system does not degrade the signals of KFMB–TV. It also attached a supplementary economic report purporting to show that CATV carriage does help UHF generally and Channel 39 specifically.

ties of network stations and threaten the continued existence or commencement of UHF stations; that carriage provides only short-run benefits to UHF stations; and that same-day non-duplication is insufficient because it has little relevance to non-network programs. In conclusion, Midwest requests that the Commission set the matter for hearing on the issues raised in the petition for permanent relief; that pending final disposition, the respondents be directed not to extend the Los Angeles stations' signals beyond the boundaries previously specified; and that Southwestern's motion to dismiss the petition for temporary relief and Rancho Bernardo's petition to be dismissed from the proceeding be denied.

16. We think Midwest has presented a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area. At paragraph 149 of the Second Report and Order (2 F.C.C. 2d 725), after stating our policy with respect to "grandfathering" the existing operations of CATV systems, we stated:

> We turn now to the question whether systems extending signals beyond their Grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographic areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in

> an evidentiary hearing). While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and response in the particular case, whether such temporary relief is called for, and if so, its nature.

This case falls squarely within the terms of the policy stated above. There is considerable UHF activity currently under way in San Diego with KAAR (ch. 39) in operation until November, 1965, with an application pending for educational Channel 15, with an outstanding construction permit for Channel 51 (KJOG–TV) and plans to commence operation in the near future. Several of Mission's systems, and Southwestern's system, commenced operations only some two to four months prior to the filing of the petition herein. In view of the size of the area involved (approximately 380,000 housing units in San Diego County), while the respondents' systems have relatively few subscribers, pursuant to their franchises, they have the potential for expanding throughout the entire county.

17. In this latter connection, Midwest has pointed out, and respondents have not denied, that there were

on February 15, 1966, approximately 17,000 CATV subscribers in the county and within KFMB–TV's Grade A contour, of which approximately 6,500 were located in San Diego. It was further pointed out that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and that this represents approximately 78% of all homes in the county within the station's Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are located in areas covered by CATV franchises. Mission states that construction in unincorporated communities in San Diego County has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Thus, it clearly appears that a hearing is required with respect to the over-all question of whether such potential expansion in this major market is consistent with the public interest. Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for.

18. A hearing is also appropriate here because of

the number of unresolved issues present. For instance, there is disagreement as to whether some of respondents' systems are operating within the predicted Grade A contour of KFMB–TV; there is controversy as to whether some of the respondents' systems operate within the Grade B contour of some of the Los Angeles stations carried on the system (but in this respect, see also par. 19, *infra.*); there is a serious question as to whether respondents' systems degrade the San Diego signals carried and particularly the signals of KFMB–TV; the degree of CATV penetration of the market is contested; and, of course, there is controversy as to whether carriage on the systems will help or hurt new or prospective UHF stations in San Diego. These issues are all particularly appropriate for resolution in an evidentiary hearing. We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on all of these matters.

19. Some of the respondents have alleged that since their systems operate within the predicted or measured Grade B contours of the Los Angeles stations carried on their systems, the provisions of paragraph 149 of the Second Report, *supra,* which relate generally to extension of beyond Grade B signals, do not apply to their systems and that they may, therefore, continue to expand without hindrance. This contention, however, misconceives the main thrust of our major market policy. The Commission's primary concern with respect to CATV operations in the major markets importing distant television signals was whether such operation "may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial

competition of a patently unfair nature" (Second Report, Paragraph 139). We defined "distant signals" as those signals extended or received beyond the Grade B contours of those stations. While this standard will generally encompass our main area of concern (i.e., the importation of signals not allocated to the area), it is by no means a fixed and immutable standard to which we will blindly adhere. As we pointed out in the Second Report, CATV activity which does not involve extension of a signal beyond the Grade B contour may continue, "* * * with possibly only the rarest exception * * *." (Second Report, paragraph 151). This exception involves a situation where, for instance, two major markets fall within one another's Grade B contours and the importation of signals of the stations in one market into the other would equalize the quality of the distant signals, possibly change the viewing habits of the latter community and affect the development of independent UHF stations there. Assuming, *arguendo,* as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations, this is exactly the situation presented here. The Los Angeles stations are located more than 100 miles from the San Diego main Post Office and, while they may provide service to some parts of San Diego, the issue is what kind of service as compared to that of the local San Diego stations, and what is the effect on the latter of CATV which "equalizes" the technical quality of the local San Diego signals and the more than 100 mile distant Los Angeles stations. Thus, the problem is not resolved merely by a showing that the Los Angeles stations do provide Grade B signals to parts of San Diego County.

20. It is clear, therefore, that a hearing is necessary with respect to the overall question of CATV expan-

sion in this major market and that some form of temporary relief is necessary and appropriate "before consequences possibly adverse to the public may develop." Before discussing the nature and form of the temporary relief to be prescribed, there are three matters raised by respondents which we will briefly discuss.

21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also Sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the

authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission,* 327 F. 2d 893, 896–897 (C.A.D.C., 1964).

Second, respondents Mission and Southwest contend that their systems are grandfathered to the limits of their franchises. We reject this position, since it is totally inconsistent with the policy expressed in paragraph 149 of the second report (see, also Letter to Telerama, Inc., 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11] Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, *pendente lite,* if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they

limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

22. The question now is the nature and form of the temporary relief to be afforded. In its petition, and particularly the supplement thereto, Midwest specified with great particularity and precision "eight separate and discrete islands of CATV subscriber service as of February 15, 1966," alleging that these "islands" were located in recognized geographical areas in San Diego and that the islands were further circumscribed by recognizable and known geographical areas. These latter areas were also described with great precision and it was alleged that from the eight islands, as they existed on February 15, 1966, the respondents have extended and are continuing to extend their lines and service beyond the boundaries within the geographical areas which they partially occupied and, also, into new geographical areas. Midwest asks essentially, that pending final disposition, respondents be ordered to confine delivery of Los Angeles signals to subscribers located within the geographical boundaries inside of the eight general area which circumscribe the areas

[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

where the systems were operating on February 15, 1966.[13]

23. Neither Mission nor Southwestern has factually challenged Midwest's description and specification of the geographic areas and their boundaries. Rather, they take the position that their franchise areas constitute the appropriate geographic limitations. We have, however, rejected this contention (see paragraph 21, *supra*). Mission, with its opposition, submitted a detailed map which, in part, indicates for the entire area where systems were operating on February 15, 1966. Midwest states in its reply that the map, in large part, confirms the boundaries specified by it in its supplement and that, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966. We have also reviewed the map and compared it with the specific boundaries detailed in Midwest's supplement and it appears that, with the exception of the Chula Vista area, the parties are largely in agreement as to the boundaries of the areas where Mission was operating on Februry 15, 1966.

24. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Mission to confine delivery of the Los Angeles signals carried on its systems to subscribers within those areas where Mission indicated in its map (appended as attachment G to its opposition) it was operating on February 15, 1966. We will also accept Mission's map designation with respect to the Chula Vista area, provided, however, that our

[13] Midwest has indicated in a subsequent pleading that it does not object to dismissing Poway Cable TV from the proceeding and that it is not pressing its request for temporary relief as to Rancho Bernardo. Accordingly, we are only concerned with framing temporary relief as to Mission's and Southwestern's systems.

action with respect to Chula Vista is without prejudice to any further showing Midwest may present to support its position as to the geographic boundaries, as of February 15, 1966, of the area served by Mission's Chula Vista system. Upon an appropriate showing, we will give further consideration to Midwest's request to further restrict the Chula Vista system pending final disposition of this proceeding.

25. As to Southwestern, we have previously noted that it has not challenged Midwest's designation of the general and specific areas within which it was operating on February 15, 1966. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Southwestern to confine delivery of the Los Angeles signals carried on its system to subscribers within those areas specified by Midwest in its supplemental petition (paragraphs (A)(1) and (B)(1), pages 10 and 12, respectively, and affidavit, paragraph 5(1), pages 2 and 3), appended thereto. This action will be subject to any further showing Southwestern may wish to present to show that the geographic boundaries of the area in which it was operating as of February 15, 1966, differ from these specified by Midwest. Upon an appropriate showing and request, we will give further consideration to the question of appropriate February 15, 1966, boundaries of Southwestern's systems.

26. It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwest-

ern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the Second Report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a roll back is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.

27. Accordingly, in view of the above, and pursuant to Sections 74.1109 and 74.1107(a) and (d) of the Commission's Rules, IT IS ORDERED, that this proceeding is hereby DESIGNATED FOR HEARING, at a time and place to be specified in a further order, upon the following issues:

1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of subscribers per half mile (or other comparable convenient unit of measure) or cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966 and the date of this order, and the locations of the predicted Grade A contours of the San Diego television stations and predicted Grade B contours of the Los Angeles television stations.

2. To determine whether the signals of any of

the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent and nature thereof.

3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.

4. To determine the present penetration of CATV service by CATV systems in the San Diego market area and the potential penetration of CATV service under conditions of unlimited expansion.

5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.

6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed and potential UHF television service in the area.

7. To determine whether any conditions of future imports should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.

8. To determine whether expansion of any of respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.

9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission.

389-338 O - 67 - 5

It is further ordered, that Midwest Television, Inc. the Chief, Broadcast Bureau, Mission Cable TV, Inc., Southwestern Cable Company, Pacific Video Cable Company, Inc., Trans-Video Corp., Rancho Bernardo Antenna Systems, Inc., and Jack O. Gross, are made parties to this proceeding.

It is further ordered, that respondents have the burden of proceeding and the burden of proof with respect to issue 1; that with respect to issue 2, petitioners have the burden of proceeding and the burden of proof; that respondents have the burden of proceeding and the burden of proof with respect to issue 3; that respondents have the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to respondents' respective CATV systems, and that petitioner has the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to CATV systems other than those of respondents; that petitioner has the burden of proceeding and the burden of proof with respect to issues 5 thru 8.

It is further ordered, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. are directed to limit the operations of their respective CATV systems as set forth in paragraphs 24-26, *supra.*

It is further ordered, that the Motion to Dismiss filed by Poway Cable Television is granted and it is dismissed as a party to this proceeding.

It is further ordered, that the Motion to Sever and the Motion to Dismiss filed by Southwestern Cable Co. and the Petition to be Dismissed filed by Rancho Bernardo Antenna Systems, Inc., are denied.

It is further ordered, that the request for oral argument of Mission Cable Television, Inc., Pacific Video Cable Co., Inc. and Trans-Video Corp. is denied.

It is further ordered, that the petition filed by Midwest Television, Inc., and the supplement thereto, to the extent indicated above, is granted, and, in all other respects, is denied.

It is further ordered, that, to avail themselves of the opportunity to be heard, the parties herein, pursuant to Section 1.221 (e) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate a written appearance stating their intention to appear on the date set for the hearing and present evidence on the issues specified in this Order.

It is further ordered, that the ruling as to temporary relief shall be effective on the 3rd day, not counting Saturdays, Sundays and holidays, after the day of release of this opinion, provided that the ruling on temporary relief shall not be effective until judicial determination of the motion for a stay in the case of any respondent which notifies the Commission within two days that it intends to seek judicial review and which seeks judicial review and a judicial stay within 14 days of the day of release of this opinion.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

Adopted: July 20, 1966.
Released: July 25, 1966.

Before the Federal Communications Commission,
Washington, D.C.

Docket No. 16786

IN THE MATTER OF THE PETITION OF MIDWEST TELEVISION, INC. (KFMB–TV), SAN DIEGO, CALIFORNIA, FOR IMMEDIATE TEMPORARY AND FOR PERMANENT RELIEF AGAINST EXTENSIONS OF SERVICE OF CATV SYSTEMS CARRYING SIGNALS OF LOS ANGELES STATIONS INTO THE SAN DIEGO, AREA, PETITIONER

v.

MISSION CABLE TV, INC., EL CAJON, CALIFORNIA, SOUTHWESTERN CABLE CO., SAN DIEGO, CALIFORNIA, PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIFORNIA, TRANS-VIDEO CORP., EL CAJON, CALIFORNIA, RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIFORNIA, AND POWAY CABLE TV, POWAY, CALIFORNIA, RESPONDENTS

ERRATUM

In the Commission's Memorandum Opinion and Order in the above-entitled proceeding, released July 25, 1966, FCC 66-683, 86406, paragraph 21 is corrected to read as follows:

"21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform 'any and all acts, make such rules and regulations, and issue such orders, not inconsistent with

[the] Act, as may be necessary in the execution of [our] functions.' Section 4(i). See also Sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission*, 327 F. 2d 893, 896–897 (C.A.D.C., 1964). Second, respondents Mission and Sutohwest contend that their systems are 'grandfathered' to the limits of their franchises. We reject this position since it is totally inconsistent with the policy expressed in paragraph 149 of the Second Report (see, also, *Letter to Telerama, Inc.*, 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11]

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice-president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, *pendente lite,* if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if

some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration."

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

Released: July 26, 1966.

---

[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

[Filed - August 23, 1966]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHWESTERN CABLE CO.,
Petitioner,

v.

No. 21183

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and TRANS-VIDEO CORP.,
Petitioners,

v.

No. 21192

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

INTERLOCUTORY INJUNCTION

Before: HAMLEY, BROWNING and DUNIWAY, Circuit Judges

Southwestern Cable Co., having petitioned this court, pursuant to section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. § 402(a) (1964), and sections 2 and 3 of the Judicial Review Act of 1950, as amended, 64 Stat. 1129 (1950), 5 U.S.C. §§ 1032, 1033 (1964), to review the Memorandum Opinion and Order of the Federal Communications Commission (Commission) released July 25, 1966, as corrected in an Erratum released July 26, 1966; and

Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp., having likewise petitioned this court, pursuant

to the same statutes, to review the described order of the Commission; and

All petitioners having applied to this court, pursuant to section 9(b) of the Judicial Review Act of 1950, 5 U.S.C. § 1039, to issue an interlocutory injunction staying the effectiveness of the described order of the Commission, pending final disposition of the petitions to review, and having obtained from a judge of this court, on August 10, 1966, orders staying the following portions of the described Commission order:

> "IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26 *supra*."

insofar as the quoted portion of the order refers to petitioners and to paragraphs 25 and 26, with the proviso in each such stay order, that the same is subject to reconsideration by this court in the event that respondent Commission files with this court its objections to the relief granted herein within thirty days of the date of the stay orders; and

United States of America and the Commission, respondents herein, having timely filed a motion for reconsideration of the stay orders and their opposition to the granting of an interlocutory injunction herein, and the matter having come on for hearing before this court on August 22, 1966, on due notice, all petitioners and respondents being represented by counsel; and the court having granted the motion of respondents to consolidate the two review proceedings for all purposes; and having granted the motions of Midwest Television, Inc., Jack O. Gross, and San Diego Telecasters, Inc., for leave to intervene in the consolidated proceedings; and the intervenors having filed a joint opposition to the application for an interlocutory injunction, and being represented at the hearing by counsel; and

The court finding, on the basis of affidavits of Richard A. Moore and K. C. Hawkins attached to the application of Southwestern Cable Co. for an interlocutory injunction, and the affidavit of K. C. Hawkins attached to Southwestern Cable Co.'s opposition to motion for reconsideration, that if that petitioner is required, pending the disposition of this review proceeding, to desist from adding new subscribers to its presently existing trunk and feeder lines, it in all probability will be unable to extricate itself from its present financial difficulties and may be forced to suspend all operations; and in any event will lose substantial and irretrievable gross income, thereby causing irreparable damage; and

The court further finding, on the basis of the affidavit of Henry R. Goldstein, attached to the application of Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp., that if those petitioners are required, pending the disposition of this review proceeding, to desist from adding new subscribers to their presently existing trunk and feeder lines, they will lose substantial and irretrievable gross income, their franchises may be endangered, and the resulting curtailment of operation will require those petitioners to lay off a substantial number of highly skilled workmen, thereby causing irreparable damage; and

The court further finding that respondent Commission concedes that none of the petitioners is presently in violation of the governing statutes and Commission rules with respect to any of the matters dealt with in the described Commission order, and further finding that the public interest requires that an interlocutory injunction issue, now therefore IT IS

ORDERED, that pending the final disposition of these review proceedings, that portion of the Memorandum Opinion and Order of the Commission released July 25, 1966, as corrected in an Erratum released July 26, 1966, which reads as follows:

> "IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26, *supra*."

is hereby stayed insofar as it would require the named companies to desist from adding new subscribers to their trunk and feeder lines in existence on August 23, 1966; and IT IS

FURTHER ORDERED, that the stay orders entered herein on August 10, 1966, are hereby vacated; and IT IS

FURTHER ORDERED, that if the Commission is so advised, it may apply for an order expediting these review proceedings.

DATED: August 23, 1966.

Frederick G. Hamley
James R. Browning
Ben. C. Dunniway
United States Circuit Judges

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOUTHWESTERN CABLE CO., *Petitioner,* vs. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* JACK O. GROSS, et al., *Intervenors.*	No. 21,183
MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP., *Petitioners,* vs. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* JACK O. GROSS, et al., *Intervenors.*	No. 21,192

[April 28, 1967]

On Petition for Review of a Memorandum Opinion and Order of the Federal Communications Commission

Before: BARNES and ELY, Circuit Judges; PECKHAM,* District Judge

BARNES, Circuit Judge:

This is a consolidation of two petitions to review and set aside portions of an order of the Federal Communications Commission

*Robert F. Peckham, Northern District of California, sitting by designation.

(hereinafter "FCC" or "Commission"). Our jurisdiction rests upon 5 U.S.C. § 1032 and 47 U.S.C. § 402(a).

Southwestern Cable Company owns a community antenna television system (commonly designated a CATV system) in the San Diego area. Mission Cable TV, Inc. and Pacific Video Cable Company own CATV systems in the San Diego area which are operated by Trans-Video Corporation which owns all of Pacific and a majority of Mission.

CATV is a way of delivering good television reception to areas greatly removed from the originating station. The concept includes the building of a large antenna in an area where reception is good. The antenna picks up the signal of one or more stations and transmits it or them, either by wire or microwave, to the area of poor reception. In the poor reception area the signal is distributed to individual television receivers by wire, each receiver paying installation and monthly service fees. Southwestern, Mission and Pacific, petitioners here, all use cable systems rather than microwave for transmission of the signals.

San Diego is about 120 miles south of Los Angeles. San Diego is served by two VHF and one UHF television stations in San Diego and two VHF stations in nearby Tijuana, Mexico. A construction permit has been issued for another UHF station, and an application is pending for still another. For the most part, San Diego receivers cannot receive the signals of Los Angeles stations through the air. It is by CATV that many San Diegans can now watch Los Angeles programs.

The recent growth of CATV systems has come to the attention of the FCC. At first the FCC, without dissent, held it had no jurisdiction over CATV. 26 F.C.C. 403, 427-28 (1959). It next held it was authorized to deny a CATV microwave transmission license for economic reasons. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962, *aff'd* 321 F.2d 359 (D.C. Cir. 1963)), *cert. denied* 375 U.S. 951 (1963). It then asserted jurisdiction only over CATV systems using microwave facilities to transmit their signals. See First Report and Order, 38 F.C.C. 683, 30 Fed. Reg. 6038 (1965). On April 23, 1965, the Commission released a Notice of Inquiry and Notice of proposed Rule Making (1 F.C.C.2d 453, 30 Fed. Reg. 6078 (1965)) looking toward regulation of all CATV systems. On February 15, 1966, the Commission issued a news

release announcing that new rules would shortly be adopted applying to non-microwave CATV systems. These rules were adopted on March 8, 1966, and published on March 17, 1966. Second Report and Order, 2 F.C.C.2d 725, 31 Fed. Reg. 4540 (1966). The rules provided, inter alia, that (1) CATV systems must carry the signals of local and nearby stations, (2) CATV systems cannot carry on the same day a signal which duplicates a program of a local station, and (3) Commission approval is required for a CATV system to carry a signal beyond its Grade B contour.[1]

In addition to the foregoing rules, the Commission adopted Rule 74.1109 (47 C.F.R. § 74.1109), which provides that on petition by a CATV system, television station or other interested person the Commission may waive any of its rules or impose additional requirements. Rule 74.1109(f) provides in part:

> "In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief."

On March 17, 1966, Midwest Television, Inc., a licensee of a San Diego VHF station (and herein an intervenor), petitioned under Rule 74.1109(f) for temporary relief pending a hearing on the effects of CATV on the television stations in San Diego. On July 25, 1966, the Commission, in the order under review here, granted Midwest the temporary relief it sought by limiting the CATV systems, petitioners here, to (1) delivering Los Angeles

---

[1]Grade B is one of a trio of ratings according to the strength of a signal. The grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade—90%; Grade A—70%; Grade B—50%.

The signal, of course, is strongest nearer the point of origination, and becomes progressively weaker as it is removed further from the point of origination. Intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions can often impair or make impossible good television reception. That area where the signal reception is Grade B is described as being within the Grade B contour. CATV systems, of course, build their antennae in Principal City areas and then carry the signals into the Grade B contour and beyond.

signals to subscribers in the area which they served on February 15, 1966; (2) adding subscribers in other areas, but to them carrying only San Diego-Tijuana signals; and (3) continuing to provide the service they had been providing prior to the date of the order.

Petitioners sought review by this court of the July 25, 1966 order, and asked for a stay of the Commission's order. After argument we issued an interlocutory injunction against enforcement of the order as it prevents the addition of new subscribers to the trunk and feeder lines in existence on August 23, 1966.

Petitioners have specified many grounds for setting aside the Commission's order, some of constitutional dimension. Initially we must consider the assertion that the Commission did not have the power to issue the order in question. We agree with the petitioners that the Commission was without power to act as it did.[2]

The order issued by the Commission was prohibitory in nature. Though petitioners contend that it was in truth a cease and desist order, the Commission has expressly denied that it is such an order and disclaimed the authority of 47 U.S.C. § 312 which authorizes such orders. The Commission tells us that its only

---

[2]After this case was heard, the Commission issued its Memorandum Opinion and Order, disposing of various petitions which had been filed, largely by cable-television owners and operators, seeking reconsideration of the Commission's Second Report and Order (2 F.C.C.2d 725) which had adopted rules with respect to CATV. Memorandum Opinion and Order, ... F.C.C.2d ..... (released January 19, 1967). Of the seven Commissioners, one did not participate, one was absent and two dissented. See particularly the dissenting opinion of Commissioner Loevinger, wherein he states, among other things:

> ". . . [I]t is by no means clear that there is a majority of the Commission in support of the jurisdiction that is in fact being exercised; . . . .
>
> "If such reasons [as given in the majority opinion] are adequate to support jurisdiction, then there is no limit to the authority of this Commission.
>
> "I do not believe that Congress even intended to grant or will in the future ever act to grant such a vague and limitless jurisdiction as the Commission now asserts and exercises. . . . [T]here is a strong . . . reason for insisting that the broad power of regulation should be confined within the jurisdiction specified by Congress in statutes, ..."

sources of authority for the order in issue are section 4(i) of the Act[3] and section 303(r) of the Act.[4]

> "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).
>
> ". . . [T]he Commission . . . shall—
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." 47 U.S.C. § 303(r).

These provisions are general, couched in broad and indefinite terms.[5] There is no doubt that Congress intended by these provisions to provide the Commission with a degree of flexibility in performing its important tasks. Such provisions, however, by their own terms, are to be measured by the Act and its structure and purpose.

The method of regulation of broadcasting chosen by Congress was licensing. The Commission was created and charged with supervising the licensing function, to the end of promoting the development of the best radio (and later television) service in the public interest. To fulfill its duties the Commission was given two

---

[3] 47 U.S.C. § 154(i). References to the Act or to sections are to the Communications Act of 1934, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.), unless otherwise indicated.

[4] 47 U.S.C. § 303(r).

[5] We note in passing the placement of these provisions within the structure of the Act. Section 154(i) is preceded by a provision defining a quorum and authorizing judicial notice of the Commission's seal (47 U.S.C. § 154(h)), and followed by one regarding the conduct of proceedings (47 U.S.C. § 154(j)).

Section 303(r) is preceded by a provision authorizing the Commission to require painting or illuminating of radio towers (47 U.S.C. § 303(q)), and followed by one authorizing the Commission to require all television receivers to be able to receive all frequencies.

weapons under section 312, revocation of the license and (since 1952) the cease and desist order. Restricting these powers, however, Congress specified certain procedural safeguards, 47 U.S.C. § 312(c), (d) and (e).

We are fully aware of the authorities which have sustained grants of power to agencies and interpreted such powers so as to give those agencies a high degree of flexibility. In *Clear Channel Broadcasting Service v. United States,* 284 F.2d 222 (D.C. Cir. 1960), the FCC's powers, specifically including section 303(r), were described as "broad" in reference to an order regarding skywave interference. In *Public Service Comm'n v. FPC,* 327 F.2d 893 (D.C. Cir. 1964), the District of Columbia Circuit discussed the powers of the Federal Power Commission with language which we feel is equally applicable to the authority of the FCC.

> "All authority of the Commission need not be found in explicit language. . . , While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail." 327 F.2d at 897.

We cannot, however, extend this language to include the power claimed by the Commission in the case at bar. We note some of the cases in which the Commission's authority has been sustained. *Bendix Aviation Corp. v. FCC,* 272 F.2d 533 (D.C. Cir. 1959), *cert. denied,* 361 U.S. 965 (1960), concerned an application by Bendix for authority to use the 430 Mc radio frequency in developing an aircraft collision prevention system. Prior to the application, frequencies in the 420-450 Mc band had been reserved exclusively for government use. The court sustained denial of the application without a hearing. The denial of the authority Bendix sought, which would have been a license, was challenged procedurally in that it had been denied without a hearing. Although the court cites section 4(i) and 303(r) of the Act, both of which are set out above, there appears to have been no real challenge to the Commission's power to deny the license, so that the authority for the court's decision is that cited as section 4(j) of the Act (47 U.S.C. § 154(j)), providing for procedural flexibility. *Cf. FCC v. Schreiber,* 381 U.S. 279 (1965).

Mesa Microwave, Inc. v. FCC, 262 F.2d 723 (D.C. Cir. 1958), is a case dealing with CATV problems. Mesa used microwave to

carry signals and therefore needed a license. It filed an application, but no action was taken as the Commission had "frozen" all applications pending an inquiry. The petition for a writ of mandamus was denied because the delay had not been so great (about six months) as to warrant the extraordinary remedy of mandamus. Later, in *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963), the court described the action in *Mesa* as declining to upset a "freeze" on the processing of license applications. In *Kessler* the District of Columbia Circuit affirmed the "freeze" order as it halted the acceptance of applications for certain radio licenses. The basis of the decision was that the "freeze" order was procedural, and the later denial of the applications without a hearing was permissible. The unstated authority is probably section 4(j) of the Act, as in *Bendix, supra*.

The decisions examined above deal either with the licensing authority of the Commission or procedural questions related to licensing proceedings.[6] Petitioners in the case at bar point out that they have not sought a license from the Commission, nor are they required to do so.

Our resolution of the present case is guided by the language of the Supreme Court in *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1950). In that case the FCC granted a license on the condition that the station repudiate its contract with certain persons, which contract, it was found by the Commission, endangered the financial ability of the station. After repudiation, a state court entered judgment for breach of contract against the station. The contention was raised that by its order the FCC had invalidated the contract. The Supreme Court noted the scope of the agency power:

> "As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. . . . These cases [*FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)] make clear that the Commission's

[6]The Commission's primary authority is such a case. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), dealt with the Commission's rule that it would not issue a license if the applicant already operated five television stations. Storer, owning five, objected that its application for a sixth was denied without a hearing.

regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." 338 U.S. at 597-99 (footnotes omitted).

Dealing specifically with one of the provisions in issue here, to wit, the powers under section 303(r) of the Act, the Court said:

> "One suggestion is that petitioner's position has a specific statutory basis [for invalidating the contract] in § 303(r), which permits the Commission to prescribe such 'conditions' as are 'necessary to carry out the provisions' of the Act. We do not think the suggestion is sound. Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. *It is in connection with this power that § 303(r) is to be interpreted.*" 338 U.S. at 600 (emphasis added).

In *Carroll* the Court recognized the Commission's embarrassing lack of ability to issue cease and desist orders together with its attempts to remedy the situation. The Court noted that the Commission had requested the power from Congress, "but, so far as we are aware, the Commission request did not go beyond asking for power to issue a cease and desist order *against a licensee.*" 338 U.S. at 602 (emphasis added). The Court had reference to S. 1333, 80th Cong., 1st Sess. (1947), which was one of the predecessors to the Communications Act Amendments, 1952, 66 Stat. 711 (1952). It was the 1952 amendments which enacted the cease and desist authority of section 312 of the Act.[7] We point this out to show that in 1950, when *Carroll* was decided and sections 4(i) and 303(r) were exactly as they are today, the power the Commission possessed was exercisable only against licensees or applicants. Put another way, sections 4(i) and 303(r) did not, in 1950, authorize action against a nonlicensee.

---

[7]The direction of the Commission's powers was apparently understood by Congress to be limited to licensees when it considered the 1952 amendments to the Act. "It is believed that the authority to issue cease and desist orders will give the Commission a means by which it can secure compliance with the law and regulations *by licensees.*" Conf. Rept. No. 2426, 1952 U.S. Code, Cong. & Ad. News 2234 (emphasis added).

The Supreme Court again analyzed the limits of the Commission's power in *FCC v. American Broadcasting Co.*, 347 U.S. 294 (1954). In that case the Commission had issued rules against "give-away" programs. The Court was concerned with the relationship between the Commission's action and the criminal sanctions against broadcasting lottery information, 18 U.S.C. § 1304.

> "Like the court below, we have no doubt that the Commission, concurrently with the Department of Justice, has power to enforce § 1304. Indeed, the Commission would be remiss in its duties if it failed, *in the exercise of its licensing authority*, to aid in implementing the statute, either by general rule or by individual decisions.[7] But the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under [18 U.S.C.] § 1304, the Commission cannot employ the statute [the Communications Act] to make them so by agency action." 347 U.S. at 289-90 (emphasis added).

The Court's footnote specifically notes sections 4(i) and 303(r). In view of the emphasized portion of *American Broadcasting* and the specific language of *Carroll*, we reach the conclusion that sections 4(i) and 303(r) are limited to the scope of the Commission's licensing authority. *Cf. Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433-34 (1963) (Brennan, J., concurring).

The logic of our conclusion seems to us inescapable. If the authority of sections 4(i) and 303(r) were as broad and extensive as the Commission urges, the authority of section 312 to issue cease and desist orders would be meaningless or repetitive. There is nothing to indicate that if the Commission is empowered to issue an order like that under review it cannot similarly issue a cease and desist order without the safeguards of section 312. *Cf. United States v. National Plastikwear Fashions, Inc.*, 123 F.Supp. 791 (S.D. N.Y. 1954). We must assume that when Congress in 1952 gave the Commission the power to issue cease and desist orders it was not duplicating an already existing power.

Our conclusion that the Commission lacked the power to issue the order in question requires that the order be vacated and set aside. In light of our disposition of the case, we decline to express any opinion as to the other issues raised in this proceeding.

The Memorandum Opinion and Order of July 25, 1966, is VACATED and SET ASIDE to the extent that it limits the operations of the petitioners as set forth in paragraphs 24-26 of that order.

ELY, Circuit Judge (Concurring):

I endorse the carefully researched opinion of my Brother Barnes, and I concur in its conclusions. I think it appropriate, however, to emphasize the basic justice of our decision.

As Judge Barnes relates, the Commission had, prior to the commencement of petitioners' activities, disavowed its power to regulate such activities.[1] It is not unreasonable to assume that the petitioners considered this history in making their determinations to embark upon their ventures. They then undertook their lawful pursuits, investing substantial sums of money and, incidentally, proceeding under the auspices of the responsible San Diego officials who issued the required municipal permits. Not until petitioners had incurred the expense of installing necessary and fixed facilities and had acquired subscribing customers did the Commission presume to issue the order which, if enforceable, would adversely affect, if not destroy, the petitioners' investments.

In the light of the only conferred powers under which its authority exists, reviewed by my Brother Barnes, and in the light of all the circumstances, some of which I have briefly stated, I believe that the Commission trespassed upon constitutional safeguards against the confiscation of property.[2]

---

[1]It had unsuccessfully sought legislation which would have specifically given it the jurisdiction which it now claims to have always had S. 2653, 86th Cong., 1st Sess. (1960).

[2]Compare *California Citizens Band Association, Inc. v. United States*, ... F.2d ..... (9th Cir. 1967), wherein we very recently held that the Commission was fully empowered to adopt reasonable regulations affecting licensees whose operations clearly fell within the Commission's jurisdictional powers of supervision and regulation.

In the United States Court of Appeals for the Ninth Circuit

No. 21183

SOUTHWESTERN CABLE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

No. 21192

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE COMPANY AND TRANS-VIDEO CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

Before BARNES and ELY, Circuit Judges, and PECKHAM, District Judge.

DECREE

These causes came on to be heard upon the petitions of Southwest Cable Company and Mission Cable TV, Inc., Pacific Video Cable Company and Trans-Video Corporation, to review a memorandum opinion and order of the Federal Communications Commission issued by it on July 25, 1966, with an erratum issued on July 26, 1966.

The court heard argument of respective counsel on January 10, 1967, and has considered the briefs and transcript of record filed in these causes. On April 28, 1967, the court being fully advised in the premises handed down its opinion in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED. by the United States Court of Appeals for the Ninth Circuit that the memorandum opinion and order of July 25, 1966, of the said Federal Communications Commission is vacated and set aside to the extent that it limits the operations of the petitioners as set forth in paragraphs 24–26 of that order.